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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1974

OPINIONS OF APRIL 15 THROUGH (IN PART) JUNE 16, 1975

ORDERS OF APRIL 7 THROUGH JUNE 9, 1975

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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ERRATA

389 U. S. 247, line 9: "Untied" should be "United."

404 U. S. 1283, line 10: "p. III" should be "p. v."

410 U. S. 735, line 15 from bottom: "Petitioner" should be "Appellant."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. CHIEF JUSTICE WARREN*

TUESDAY, MAY 27, 1975

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to the late Chief Justice Earl Warren.

Mr. Solicitor General Bork addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

The resolutions unanimously adopted are as follows:

The members of the Bar of the Supreme Court have met today to record our respect and admiration for Earl Warren, who served as Chief Justice of the United States from October 5, 1953, until his retirement on June 23, 1969.

It is impossible to capsulize Chief Justice Warren's extraordinary contribution to the life of this Nation, or adequately to express what he meant to the many mil-

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*Mr. Chief Justice Warren, who retired from active service on June 23, 1969 (395 U. S. VII), died in Washington, D. C., on July 9, 1974 (418 U. S., p. v). Services were held at Washington National Cathedral prior to his interment at Arlington National Cemetery on July 12, 1974.

lions of people—both in the United States and elsewhere—who knew him or knew of him. Earl Warren's retirement as Chief Justice represented the culmination of 52 years of official public service in local, State, and National governments. His public service hardly lessened, however, upon his retirement from the Court—it simply became unofficial. He originally intended to devote his years of retirement to writing; and, indeed, he completed one book after he left the Court and made substantial progress on others. In recognition of the affection and support that he had received throughout the years from his wife, Nina Warren, and their large family—a marriage and a family that were crucially important and a bulwark to him—he dedicated that book "[t]o one of the most important segments of our citizenry, the millions of American mothers—including my wife, Nina—whose fondest hope is that their children will be responsible citizens, and whose faith in humanity and love of freedom sustain their belief that this will be achieved." [1]

Chief Justice Warren's desire for more direct contact with the people whom he had served for so long and his interest in the youth of this Nation were too great, however, and he spent most of his retirement traveling to colleges and universities throughout the country—explaining the work of the Court and affirming his faith in our system of justice, his respect for international law and the role of the United Nations and his confidence in the capacity of the American people to assist in the universal realization of all the rights guaranteed by the Constitution. The richness of his legacy, which even today cannot be completely appreciated, will undoubtedly ensure him an important place among the great figures in our Nation's history.

Chief Justice Warren presided during a period often regarded as one of the most turbulent in the Supreme

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[1] E. Warren, A Republic, If You Can Keep It (1972).

Court's history, and it was perhaps inevitable that the Court's record during those years should have become so closely associated with him. The decisions handed down during the period of Earl Warren's service as Chief Justice are often referred to as decisions of the "Warren Court." Earl Warren objected to this characterization. And it is true, of course, that Chief Justice Warren was only one among nine; ultimately, with only one vote to cast in conference with his Brethren. Earl Warren was ever mindful of this fact. Indeed, during the ceremonies attending his retirement from the Court, Chief Justice Warren chose to emphasize that the Supreme Court had been manned during his tenure by wholly independent Justices. But he was convinced that this diversity was an important ingredient of the Court's strength. Speaking extemporaneously, Chief Justice Warren noted:

> "We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences." [2]

But Earl Warren's recognition of and respect for the independence of his Brethren was a foundation for, rather than a relinquishment of, his leadership role on the Court. Of course, those not privy to the Court's ultimate deliberations can never know precisely what occurs there. We do know, however, that during Earl Warren's tenure as Chief Justice the Supreme Court rendered decisions among the most important in the Nation's history and that those who served with him on the Court consistently have acknowledged their great respect for the strength and effectiveness of his leadership.

During his tenure Chief Justice Warren became the personification of the Supreme Court. He became the focus for the gratitude of those who approved of the

[2] 395 U. S. xi (1969).

Court's pronouncements and for the criticism of those who did not. The simple courage and dignity that he displayed upon being thrust into this role was of immense public significance, and was in itself a source of institutional strength.

Like Abraham Lincoln, the Chief Justice was subjected to almost unparalleled abuse in the conduct of his office. He was a very human person and these attacks must have made his heart ache, but he never showed in either his demeanor or his decisionmaking that it affected his resolve in any way.

The Chief Justice's courage and dignity characterized his entire public life. Whether as the crusading District Attorney for Alameda County or the Attorney General of California, or as the dedicated and innovative three-term Governor of California, Earl Warren had always refused to compromise principle in the face of public or private criticism and had conducted himself according to the dictates of his conscience.

No one who attended a session of the Supreme Court while Earl Warren was presiding could have failed to be impressed with his attentiveness to the arguments of counsel or to the courtesy and fairness with which proceedings were conducted there under his stewardship. He believed deeply that the Supreme Court belonged to the people, that its continuing vitality depended in the final analysis upon its remaining a "responsive forum of last resort." [3] He labored mightily to make this conception of the Court a reality, and the success of those labors is reflected in the decisions of which he was so inseparably a part.

Even the most painstaking effort to categorize 16 years of Supreme Court litigation, calling for literally hundreds of thousands of individual judgments by mem-

[3] E. Warren, Address at New York University Law School Convocation on October 4, 1968; quoted in Mitchell, The Warren Court and Congress: A Civil Rights Partnership, 48 Neb. L. Rev. 91, 100 (1968).

bers of the Court, cannot escape being inadequate in many respects. We wish, nevertheless, to focus particularly upon three interrelated themes sounded repeatedly in decisions of the Supreme Court during Chief Justice Warren's tenure: first, the concern with ensuring that the civil rights of all the people would be respected; second, the effort to strengthen democratic processes of self-government; and, third, the structuring of an equitable system of criminal justice consistent with elemental human dignity. It was perhaps pre-eminently in these three areas that the Warren Court in general, and Earl Warren in particular, were recognized to be both the product and a producer of a profound moral and constitutional revolution.

I

If there was a single societal impulse informing more significantly than any other the development of constitutional law under Earl Warren, it was the civil rights movement. The rising social consciousness of racial minority groups—partially manifest in their demands for equality under the law—was at once the principal impetus and the result of many of the Supreme Court's decisions during those years. The era began dramatically with *Brown* v. *Board of Education*,[4] which was reargued scarcely two months after Earl Warren assumed office. The opinion written by Chief Justice Warren for a unanimous Court in *Brown* was more auspicious than many observers realized at the time because its reasoning became the foundation of many other decisions and set the tenor for much of what was to follow.

Formally at issue in *Brown* and its companion cases were claims by Negro plaintiffs that state law requiring racially segregated public schools deprived them of equal protection of the laws under the Fourteenth Amendment. For nearly 60 years, such claims had been rejected on the authority of the "separate but equal"

[4] 347 U. S. 483 (1954).

doctrine of *Plessy* v. *Ferguson*.[5] In the several years immediately preceding *Brown*, however, the Court's opinion in *Plessy* v. *Ferguson* had been substantially eroded—in part because the Court began increasingly to emphasize the "equal" half of the doctrine in assessing the constitutionality of racially segregated educational systems.[6] But so long as the "separate but equal" doctrine retained any vitality, most objections to educational systems premised upon race could be met at least in theory by reallocating resources, and without sacrificing the principle of racial separateness.

One of the impressive aspects of Chief Justice Warren's opinion for the Court in *Brown* was its definitiveness. The Court announced that *Plessy* had no further application in the field of public education, and the form of the Court's statement left little room to suppose that *Plessy* would retain any vitality in other contexts:

> "To separate [Negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [7]

The Chief Justice's opinion in *Brown* also sounded other notes that were subsequently to recur. One was its emphasis on the relationship between education and successful participation in the community's life and its democratic processes:

> "Today, education is perhaps the most important function of state and local governments. Compul-

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[5] 163 U. S. 537 (1896).

[6] *E. g.*, *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637 (1950); *Sweatt* v. *Painter*, 339 U. S. 629 (1950).

[7] 347 U. S., at 494–495.

> sory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." [8]

The Court's decision in *Brown* unleashed a flood of school desegregation cases. Resistance to the decision was massive and immediate; and in the process of dealing with this resistance, the authority of the Court was challenged as it had not been since the days of John Marshall. Had the resolve—or even the unanimity—of Chief Justice Warren and his Brethren wavered in the face of this resistance, the results could have been disastrous. But they did not waver: while permitting a phased accommodation to the basic principles announced in *Brown*, bounded by the command that compliance occur "with all deliberate speed," [9] the Court in subsequent opinions repeatedly reaffirmed those principles and marked out the area of the constitutional prohibition of racial discrimination countenanced by state law. One of the most notable of the school desegregation opinions following *Brown* was *Cooper* v. *Aaron*.[10] In that opinion, unprecedented in that it was signed by all nine Justices (including those appointed after *Brown* was decided), the members of the Court jointly stated:

> "It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised

[8] *Id.*, at 493.
[9] 349 U. S. 294, 301 (1955).
[10] 358 U. S. 1 (1958).

> consistently with federal constitutional requirements as they apply to state action. . . . Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." [11]

The disposition of the school desegregation cases inevitably undermined the legitimacy of other practices premised upon the policy of racial separateness. During the years following the decision in *Brown,* the Court received scores of petitions involving claims of racial discrimination in violation of the Fourteenth Amendment. The petitioners in many of those cases sought to overturn state criminal convictions arising out of their participation in civil rights demonstrations of various kinds. In reversing these convictions, the Court—often speaking through Chief Justice Warren—progressively narrowed the scope of permissible state involvement in racially discriminatory conduct.

An important example was *Peterson* v. *City of Greenville.*[12] There, the petitioners had been arrested for criminal trespass after having peacefully integrated a lunch counter reserved for whites in a privately owned department store and having refused to leave when ordered to do so by the manager of the store. Arguing in support of the convictions, the State contended that the racial discrimination complained of was the store manager's private policy rather than a consequence of

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[11] *Id.,* at 19–20.

[12] 373 U. S. 244 (1963).

the city's segregation ordinance, and hence that it did not violate the Fourteenth Amendment's prohibition of state-sanctioned racial discrimination. Chief Justice Warren, writing for the Court, rejected this contention:

> "[T]hese convictions cannot stand, even assuming, as respondent contends, that the manager would have acted as he did independently of the existence of the ordinance. The State will not be heard to make this contention in support of the convictions. For the convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." [13]

The Court reached the same result in *Lombard* v. *Louisiana*,[14] even though in that case there was no state statute or city ordinance forbidding the desegregation of restaurant facilities. Chief Justice Warren's opinion for the Court in *Lombard* noted, however, that the refusal to serve petitioners had taken place against the backdrop of public statements by city officials to the effect that segregation of restaurant facilities was city policy and that violations of that policy would not be tolerated. In reversing petitioners' convictions, Chief Justice Warren declared that if discrimination mandated by an ordinance may not stand "[e]qually the State cannot achieve the same result by an official command which has at least as much coercive effect as an ordinance." [15]

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[13] *Id.*, at 248.

[14] 373 U. S. 267 (1963).

[15] *Id.*, at 273.

Chief Justice Warren's abiding concern to put an end to discriminatory treatment of persons because of their race was also expressed in his opinion for the Court in *Loving* v. *Virginia*.[16] At issue in *Loving* was the constitutionality of the State of Virginia's antimiscegenation statutes. The principal argument advanced in suport of the statutes was that they did not constitute invidious discrimination based upon race because they applied equally to both participants in an interracial marriage. Chief Justice Warren rejected this contention, noting that "we deal [in this case] with statutes containing racial classifications, and the fact of equal application does not immunize [them] from [a] very heavy burden of justification" under the Fourteenth Amendment.[17] Turning then to the justifications proffered by the State of Virginia, the Chief Justice stated:

> "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." [18]

II

Chief Justice Warren—himself a successful Governor and on one occasion his party's nominee for the Vice Presidency—had an abiding confidence in the capacity

[16] 388 U. S. 1 (1967).
[17] *Id.*, at 9.
[18] *Id.*, at 11–12.

of the American people for enlightened self-government. He firmly believed that the Nation's problems can best be solved through the political process—so long as that process is democratic in fact as well as in name.

It is not, therefore, surprising that in his judgment the single most important case to be decided by the Supreme Court during the Warren years was *Baker* v. *Carr*[19]—the first case to hold that the right to equal political representation can be secured through court action.[20] Indeed, as Chief Justice Warren observed following his retirement, there might well have been no need for a *Brown* v. *Board of Education* if the political process had functioned fairly in the post-Civil War years:

> "[I]f we had had the [*Baker* v. *Carr*] decision shortly after the Fourteenth Amendment . . . most of these problems that are confronting us today, particularly the racial problems would have been solved by the political process where they should have been decided, rather than through the courts acting only under the bare bones of the Constitution. And if the Blacks and everybody else could vote . . . [and] if we believe in our institutions, if we believe that we're all supposed to be equal, every man's vote should be worth the same as every other man's vote, and . . . eventually our problems will be solved in that manner." [21]

Baker v. *Carr* opened a new era of concern for the fairness of our political processes. Chief Justice Warren himself wrote the Court's opinion in *Reynolds* v.

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[19] 369 U. S. 186 (1962).

[20] Recollections of Mr. Justice Warren, Trial Lawyers Quarterly, Vol. 9, No. 4, pp. 5, 9–10 (fall 1973) (excerpted from Chief Justice Warren's video-taped conversation with Dr. Abram Sacher, Chancellor of Brandeis University, Dec. 11, 1972).

[21] *Id.*, at 9–10.

Sims [22]—probably the most far-reaching of the 170 majority opinions he wrote during his 16 terms on the Court. The core of *Reynolds* v. *Sims* was the holding that the Constitution guarantees equal representation in state legislatures, to be measured generally by the formula "one man, one vote." The rationale of the Court's holding in *Reynolds* was set forth by Chief Justice Warren in common-sense terms that every citizen can understand:

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . .
>
> . . . . . .
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> "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." [23]

Thereafter, Chief Justice Warren joined in Justice Douglas' opinion for the Court in *Harper* v. *Virginia State Board of Elections*,[24] invalidating state laws making the payment of a poll tax a prerequisite to voting in state elections. He also joined in Justice Black's majority opinions in *United States* v. *Mississippi*,[25] holding that the Attorney General of the United States had the authority to challenge devices utilized by the State of Mississippi to disenfranchise blacks, and in *Louisiana* v.

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[22] 377 U. S. 533 (1964).
[23] *Id.*, at 562, 567.
[24] 383 U. S. 663 (1966).
[25] 380 U. S. 128 (1965).

United States,[26] invalidating the "interpretation test" employed in the State of Louisiana for a similar purpose.

When Congress enacted the Voting Rights Act of 1965, a far-reaching measure designed to speed the full realization of minority voting rights in those States and localities in which the problems of disenfranchisement had been most persistent, it was Chief Justice Warren who wrote the Court's opinion in *South Carolina* v. *Katzenbach*,[27] upholding the challenged provisions.

The principal issues in the case turned on the proper interpretation of Section 2 of the Fifteenth Amendment, which gives Congress the power to enforce the proscription contained in Section 1 forbidding the States to deny United States citizens the right to vote on account of race or color. Chief Justice Warren stated that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress in relation to the reserved powers of the States." [28] He then quoted the classic statement of his illustrious predecessor, Chief Justice Marshall:

> "'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'" [29]

He concluded with the deeply felt hope that:

> "[M]illions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live. We may finally look forward to the day when truly '[t]he right of citizens of the United States to vote

[26] 380 U. S. 145 (1965).
[27] 383 U. S. 301 (1966).
[28] *Id.*, at 326.
[29] *Ibid.*

> shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.' " [30]

III

Prior to his appointment to the Court, much of Earl Warren's life had been devoted to the administration of criminal justice. His vigor and evenhandedness as a state prosecutor had contributed significantly to his early electoral successes in California and, to a somewhat lesser extent, his national prominence. This background gave him an understanding of the practical problems of criminal law enforcement that made him confident that strong enforcement of the law could be achieved within the bounds of constitutional guarantees of liberty. He deeply believed that the ultimate protection of our society required that law enforcement officers, no less than others, be held to observance of the legal strictures on their conduct.

During Earl Warren's tenure as Chief Justice, an important series of decisions evolved, almost inexorably, into a principle that the Fourteenth Amendment's command that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law" applies in full measure to state law enforcement efforts most of the more specific constitutional restrictions on federal criminal procedure. Extensive reform of the Nation's criminal law enforcement has been the result. If there was an identifiable starting point, it was *Griffin* v. *Illinois*.[31] Justice Clark has simply and ably reconstructed the events from that point:

> "[Griffin] made a simple demand and one that everyone would agree had merit. It was that a transcript or authentic record of some kind should

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[30] *Id.*, at 337.

[31] 351 U. S. 12 (1956).

be furnished to indigent defendants on their conviction and appeal. People with money could get a transcript and, it was argued, to deny one to the convicted poor was an invidious discrimination. The Court agreed. I, for one, never dreamed that *Griffin* would trigger so many serious constitutional questions under the sixth amendment in such a short time. Yet in one decade cases were filed in the Court and *decided* that overturned our whole concept of criminal justice. The lawyers reasoned after *Griffin:* What good is a transcript to a poor person if he does not have a lawyer?

"This led to *Gideon* v. *Wainwright,* which required counsel to be appointed for indigent defendants in felony prosecutions. The question then posed was: What good a lawyer unless he is available at every vital point in the prosecution? And *Escobedo* v. *Illinois,* in the very next year, answered: The lawyer must be available when the suspect is 'focussed' upon as the accused. Finally, the sixty-four dollar question was: When does the 'focus' occur? And the answer was: Before interrogation, which led to the warnings of *Miranda* v. *Arizona.* It was written by Chief Justice Warren." [32]

It would unduly lengthen these resolutions were we to attempt to catalogue more completely even the major decisions of the Supreme Court under Chief Justice Warren dealing with the administration of criminal justice. It may be sufficient to recall that the basic reforms effected invariably had the Chief Justice's full support—a support that stemmed from his conviction that society's highest aspirations could not be realized unless its governors and its governed alike were required to observe the law. The Chief Justice expressed this conviction

[32] Clark, Dedication to Chief Justice Earl Warren, 48 Neb. L. Rev. 6, 11 (1968).

with great eloquence in the opinion he wrote for the Court in *Spano* v. *New York*,[33] a case involving a claim that the petitioner's conviction had been secured in part through use of an involuntary confession. The Chief Justice stated that Spano's claim called upon the Court

> "to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement.
>
> . . . . . .
>
> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." [34]

As Chief Justice of the United States, Earl Warren was for 16 years the principal custodian of the legal institutions and processes which—along with our right to self-government that he so notably fostered—are America's most hallowed treasures. He was acutely conscious of the magnitude of his responsibilities as Chief Justice, and for all of those years he devoted his enormous energies to performing his responsibilities as Chief Justice as effectively as possible. Only the most insistent urgings in the name of the national interest—as with his chairing of the Warren Commission—were permitted to intrude upon his devotion to his duties as Chief Justice; but even during the period when the work of the

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[33] 360 U. S. 315 (1959).

[34] *Id.*, at 315, 320–321.

Warren Commission was in progress, Chief Justice Warren continued his full workload at the Court. Always, his reverence for the Constitution was the devoted faith of a man dedicated to two linked tasks—"to . . . establish Justice . . . and secure the Blessings of Liberty to ourselves and our Posterity."

WHEREFORE, it is RESOLVED that we, the Bar of the Supreme Court of the United States, express our profound sense of loss at the passing of Chief Justice Earl Warren; we have been made a better people by the dignity, courage, and wisdom that he brought to his duties; and we shall forever be strengthened in our resolve to respect the rights of others by his insight that the rights of each of us depend upon the rights of all; and it is further

RESOLVED, that the Solicitor General be asked to present these resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General and I recognize the Attorney General of the United States.

Mr. Attorney General Levi addressed the Court as follows:

Mr. Chief Justice, and may it please the Court:

The Bar of this Court met today to honor the memory of Chief Justice Earl Warren. During the years of his stewardship, which spanned the 16 terms beginning in 1953, the Court confronted issues among the most important in its history—issues profoundly affecting the quality of our lives. Chief Justice Warren brought to this task human values of inestimable importance: common sense, unswerving personal integrity, great courage, dig-

nity, an abiding respect for those liberal and egalitarian tenets that are distinctive features of our conception of government.

Earl Warren came to this Court with almost 35 years' experience in state government. As a District Attorney and Attorney General of California he earned a reputation as a firm and fair enforcer of the law, gaining insights into the practical aspects of law enforcement, and building a basis for an assured approach—which grew throughout the years—of necessary guidelines for official conduct.

As Governor of California, Earl Warren proposed programs to promote dignity and opportunity for every individual—programs to ease the problems of the aged, to provide universal medical care through a system of compulsory health insurance, and to reduce racial barriers to full and equal employment.

His success in elective politics was perhaps less attributable to particular programs than to what a Los Angeles Times editorialist described as "the character of the man." He wrote:

> "Earl Warren is an authentic leader. The people recognize him as such. In his philosophy of public service he truly represents the people as a whole. This, too, the people recognize. He is a trained, earnest, competent, successful servant of the people."

So, too, the measure of Earl Warren's contributions as Chief Justice cannot be fully explained or truly appreciated in terms of any particular decision or group of decisions in which he participated. He remained throughout his lifetime an "authentic leader," dedicated to the betterment of the people as a whole. He perceived the cases before him as human problems, not abstract issues. He clearly understood the Court had a responsibility to speak not only to the Bench and Bar, but to all the people as well. His own opinions were written in lan-

guage all could understand—particularly in the most important cases.

Earl Warren's commitment to promoting the dignity of every individual and his interest in communicating that message to all is simply, but eloquently, illustrated by his statement in *Brown* v. *Board of Education* that:

> "To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone." 347 U. S. 483, 494 (1954).

Earl Warren retained a basic faith that the legal process established by the Constitution remained the best means of protecting the individual, thus promoting the public good. He never doubted that our democratic processes were the best approach to government and that the inherent resiliency of American life could find solutions under law for our most serious problems. He believed that individual citizens, working together, could solve society's most pressing difficulties, that the basic goodness of the people would lead ultimately to general recognition of humanitarian innovation, and that one of government's principal responsibilities was to remain sufficiently accessible to permit and to foster self government.

His faith, his commitment, his vision of the responsibilities of government were expressed by him after his retirement as follows:

> "Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence, we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently

to our storehouse of treasures." E. Warren, A Republic, If You Can Keep It 6 (1972).

On the Court, Chief Justice Warren drew upon his experiences in state government in many ways—most notably in his efforts to make our democratic processes work better. For the individual citizen he felt the need to review and refine the protective processes of the law to assure that fairness was more nearly achieved. As he favorably quoted from *Weems* v. *United States*, 217 U. S. 349, 373 (1910), in *Miranda* v. *Arizona*:

> "'[O]ur contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.'" 384 U. S. 436, 443 (1966).

He was alert to urge that the constitutional protection offered every individual be made meaningful by procedural safeguards. Thus in *Miranda*, the privilege against self-incrimination was deemed by him to be secured only if a defendant was informed of his right to remain silent and to have the assistance of counsel. So also, the Court in *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), reversed its earlier decision and determined that the right to counsel in a criminal trial is indeed a fundamental right, because the "'right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'"

Chief Justice Warren's emphasis upon the effectiveness of the political process as essential for representative self government caused him to characterize *Baker* v. *Carr*, 369 U. S. 186 (1962), and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), establishing the principle of one man, one vote, as the most important in which he participated.

"I believe," he stated in 1972, "that if we had had the [*Baker* v. *Carr*] decision shortly after the Fourteenth Amendment was adopted that most of the problems that are confronting us today, particularly the racial problems, would have been solved by the political process where they should have been decided, rather than through the courts acting only under the bare bones of the Constitution." Recollections of Mr. Justice Warren, Trial Lawyers Quarterly, Vol. 9, No. 4, pp. 5, 9–10 (fall 1973). He felt the courts had to address the problem of grossly malapportioned state legislatures because there was no way under the state political process for the people to correct this condition.

Implicit in Warren's confidence in our system was the firm belief that our government is accountable to individual citizens. This is reflected in his opinion for the Court in *Flast* v. *Cohen,* 392 U. S. 83 (1968), holding that federal taxpayers have standing to challenge the constitutionality of federal expenditures which they allege to violate the Establishment Clause of the First Amendment. Like the reapportionment cases and *Powell* v. *McCormack,* 395 U. S. 486 (1969), *Flast* also exemplifies his effort to open the courts and the process of representative government to wider access.

Chief Justice Warren brought to the Court a perception of the human and social dimensions of cases. In a speech he delivered in 1965 at a meeting of the American Law Institute, he spoke eloquently of the many and tragic causes of crime. Among them he included low standards of law enforcement. He understood the need for determined law enforcement. In such cases as *Terry* v. *Ohio,* 392 U. S. 1 (1968), which dealt with constitutional implications of police use of tactics of "stop and frisk," he sought to bring into balance the necessity to protect society and its law enforcement officers and the rights of the suspected or accused. His opinions frequently reflected his conviction that it was precisely

when the lawfulness of an individual's conduct was being officially challenged that the Court's responsibilities as expositor and guardian of the constitutional guarantees are at their greatest.

Seven years ago, I had the privilege to speak at the dedication of the Earl Warren Legal Center, in the presence of Chief Justice Warren. I then said: "In the history of our country the record of the Supreme Court of the United States under the leadership of Chief Justice Warren is unparalleled in the effective attention given to constitutional doctrines to safeguard the dignity of the individual. The accomplishment is awesome. It ranges from the basic rights of accused defendants, to the reapportionment of legislatures, to the protection of free speech, assembly, teaching and association, to freedom of conscience, to the right to equal education. And any lawyer could add to this list. The Court has thus been concerned with the well springs of our society .... But I am sure the Chief Justice would agree that many of the decisions point directions for work which cannot be accomplished by the Court by itself. New tasks have been presented for the Bar and for public and private agencies; new responsibilities have been imposed upon the individual citizens."

To many in this country and throughout the world, Chief Justice Warren was a legendary figure: a man who understood and endeavored to give substance to the aspirations of the poor, the disenfranchised, the disillusioned. He was a man who remained calm and resolute in the midst of controversy, and used his craft as judge and statesman to recreate the ideals we hold as a people. Now his memory towers, the controversy fades, and history and we can claim him as one of the great judges who have renewed the strength of our law.

May it please this Honorable Court, and in the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolu-

tions presented to you in honor and memory of the late Chief Justice Earl Warren be accepted by you, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Attorney General. The Court accepts today, with deep appreciation, the eloquent resolutions of the Bar of the Supreme Court and their tributes to our late brother, the Honorable Earl Warren, Fourteenth Chief Justice of the United States.

Your resolutions depict so well the unique public life of this remarkable man that it is difficult to find more to add by way of response.

Perhaps, both for the present occasion and for the future, we can appropriately add to the general content of these resolutions by drawing on some of our own personal contacts with him in the more intimate relationship that is reserved to those who inhabit this place as Members of the Court.

When Chief Justice Warren paid tribute to his predecessor, Chief Justice Vinson, 21 years ago, he said this of him:

> "His life glowed so brightly in all the positions he held with such distinction that even before coming to the Chief Justiceship he had devoted practically all his mature life to rendering valuable services to his country."

Surely those words form a fitting description of Earl Warren's life and service, as you have summarized them in these resolutions.

There was indeed much in common between the careers of the Thirteenth and Fourteenth Chief Justices, for each had, in a very literal sense, given his entire life to his country, foregoing the obvious success that each

would have achieved in private life, with its material rewards and privacy and freedom from the burdens of public life.

When Earl Warren came to this Court in 1953, it was under the difficult circumstances that you have alluded to, Mr. Solicitor General and Mr. Attorney General, arising, as we know, out of the sudden death of his predecessor shortly before the opening of the Term of Court.

Only those who have been part of this Court's work can understand the burdens attendant on the opening or the closing of a Term of the Court.

For a new Justice, and particularly for a new Chief Justice, to assume these responsibilities on one week's notice, four days after reaching Washington, as Earl Warren did in 1953, after having only a few days to wind up his affairs and duties as Governor of the great State of California, was a task of almost overwhelming dimensions. But his colleagues of that time watched him make the transition from executive to judicial office quietly and calmly.

It is sometimes said that we conduct our work in seclusion and secrecy. And to the degree that this is true, it is simply because there is no other way the Court can function. That very seclusion, and our concentration on each of the problems at hand, means that we are thrown together in a relationship far more intimate than that of members of the Cabinet, for example, or of the Congress.

By October 1953 the trend for a new social, economic, and political balance in American life, to which the resolutions have alluded, and which had begun after World War I and accelerated after World War II, was ready to press new problems on the courts in a greater degree than ever before in our history.

As the resolutions have noted, one crucial facet of the search for a new balance emerged in the administration of criminal justice. As we know, few lawyers in America

who ever came to this Court had a broader exposure or better understanding of the day-to-day functioning of the criminal law than Earl Warren.

Because criminal justice has such a high visibility and affects so many people, and because of the reality that thousands of years of effort by the human race have not produced effective solutions, there is a sharp divergence of opinion as to the ways and means to administer justice, even when there is a consensus on objectives.

The popular wisdom is that Justices are constantly locked in mortal combat with each other, within these walls. When that folklore was within reasonable bounds, Earl Warren could chuckle over it at lunch with his colleagues, and, drawing on his lifetime of combat in the political arena, he would remind them that there would be little to write about if the Court's work were faithfully depicted, and that news stories must color the reality to achieve readership. The truth, he would often remind his colleagues, is that, literally described, our activities are quite dull, even though not so to us.

In his 16 years here, there were numerous verbal attacks on Earl Warren and on the Court. They were not easy for him, for his family, or for the Court. Yet these attacks helped make him a symbol of what many others saw as the best about America. And this was particularly true as to the people in the emerging countries of Africa and Asia and other parts of the world.

As the resolutions have noted, the *Brown* holding came in his first year on the Court. And just as that marked a beginning, not an end, the changes in criminal law and procedure continued for most of the 16 years he presided over the Court.

Fortunately, a new attitude was beginning to emerge in the legal profession itself toward some of these changes. One example was on the right to counsel in criminal cases. For the legal profession, as for Earl Warren, the holding in the *Gideon* case, as one example,

important as it was, presented little or no difficulty. As a prosecutor and as Governor of California, he had supported the Public Defender concept.

Sometimes it was said of him that, as Chief Justice, he turned his back on all that he had stood for as a prosecutor; and, of course, few things could be a warmer compliment to a prosecutor who had become a judge. With Justice Jackson, who was once confronted, I believe, in these Chambers with a position he had previously asserted as Solicitor General, Earl Warren could say in effect: "When I was a prosecutor, I did my duty as a prosecutor; but now I am a judge."

Some people have expressed surprise that in assessing his years on the Court Earl Warren ranked *Baker* v. *Carr* and *Reynolds* v. *Sims* above even the *Brown* case, as the Attorney General has just noted. I have a feeling that he thought the result in the *Brown* case was so obvious and so overdue that he did not consider the basic decision a difficult one, and surely it was not a difficult one for him, even though he was well aware of its importance and conscious that its implementation would take a long, long time.

This was also true of the *Gideon* case, whose significance he recognized, but whose result was so clearly inevitable that it gave him no difficulty. Later, when a unanimous Court decided *Argersinger* v. *Hamlin*, 407 U. S. 25, in 1972, extending the *Gideon* principle to all cases involving imprisonment, he welcomed that holding warmly.

The reapportionment cases, of course, brought into focus his vast understanding of the American political process, and with it his passion for fairness. When we consider that the three areas that dominated the Court's attention during his tenure, as the Attorney General has pointed out, were: reapportionment, the civil rights of minorities, and criminal justice, we see that these were the problems that had engaged his attention for all of

his mature life; and in each of these areas the State of California had worked out solutions that commanded widespread and bipartisan support.

The fact that Justices disagree on the construction of a statute or the meaning of the words of the Constitution rarely has any effect on the personal relations within the Court. And with the other Justices, particularly over the lunch table, he could have a hearty laugh at a news story depicting two Justices as being enraged over their opposing positions.

Perhaps the most difficult adjustment he had to make, and it was one that he and I talked about on several occasions, was the change from being a political leader and Governor, where he was free and even obligated to respond to attack, to being Chief Justice, bound by the tradition of silence. Up to 1953, as Governor, he could answer an attack directly, or he could call on members of his party or of the legislature to state the true facts in response to an incorrect story or an opposing editorial.

He told me several times how frustrating it was when a false news account was published concerning the work of the Court, or the activities within the Court, and he could not pick up a telephone and call some responsible person to give the facts as an answer, as he was able to do while he was Governor or Attorney General.

He felt that the legal profession had some obligation to respond to attacks on the Judiciary, and he pointed to the great work done by the bar in defense of the Court, when the Court-packing episode occurred in the 1930's.

I first met Earl Warren in 1945 or 1946, when he was Governor, and we happened to stay at the same hotel in Chicago, where he was attending a meeting of State Governors. He was about to have breakfast alone in the dining room, at quite an early hour, and he asked me to join him. We quickly reached a topic of common interest concerning his then-current work on correctional

problems, and his program to overhaul the California penal system which was attracting much attention in correctional circles. He had called in a group of the best penologists in the United States and asked them to study the problems of California and recommend solutions. He then secured legislation and appropriations and brought in an outstanding penologist, Richard McGee, as the Director of penal institutions in California.

He did much the same in improving the California courts, and his nonpartisan, nonpolitical, merit appointments to the bench gave California one of the best state judicial systems in the country.

Various members of the Court recall personal kindnesses of Earl Warren, and a few of them will illustrate his thoughtfulness. When Justice Stewart was appointed to the Court in 1958, he received a call from Earl Warren asking about his travel plans and insisting on sending his car to meet him at the Union Station. When the Stewart family arrived, sometime before 7 a. m., they were met not only by the Chief's car and driver but by the Chief himself. And that presented some small logistical, practical problems, because there were six Stewarts in the party.

Another example of his thoughtfulness occurred when he was arranging to go to Florida for the dedication of a new law school at Gainesville, named for his old friend, Senator Spessard Holland, with whom he had worked in the Governors' Conference years before. In those days of frequent airplane skyjacking, a Government plane was made available to the Chief Justice for travel. And when he learned that I was on the dedication program, he called and invited me to accompany him on the plane. In the course of the trip, we talked about my view, expressed in a then-recent law school lecture, that some of the changes in criminal procedure, resulting from opinions of the Court, would perhaps better have been left to the rulemaking process.

We discussed my view that this would enable the rules of procedure to be made on the basis of a broad investigation, rather than on the narrow record of a particular case. And that it would also have the advantage of gradually developing a body of support within the legal profession and the public, affording a greater degree of acceptance of the end result when it was reached. We did not agree fully by any means in the course of that 2-hour or 2½-hour plane ride, but I think each of us returned from the trip with a better understanding of the other's position, and, for my part, a better understanding of the whole problem as it can be seen only from this Court.

On the day that I was confirmed for this Court, I telephoned and asked if Mrs. Burger and I could call to pay our respects, which we did the following day, at the Warren apartment. From that day forward, his door was always open to me, up to the time of his last illness. He always responded to my requests for advice and counsel, but rarely ever volunteered. And his wise counsel was always very helpful to me. He leaned over backward, sometimes I thought unnecessarily so, to avoid the slightest appearance of wanting to participate in dealing with the administrative problems that crossed my desk.

The transition in 1969 presented small problems that would have been of no consequence if separated from the pressures attending the final two weeks of the Term of the Court. We resolved them over lunch in several conferences. And I could not help but realize that his departure was, in some respects, as difficult as his taking office in 1953 on four days' notice.

In June 1969, he had presided over the Court for a full year after he had made the decision to retire, with all the emotional and other stresses attending such a step. When I asked him if he would administer the oath of office to me, and said that I wanted to do it in the

Court in order to emphasize the continuity of the Court as an institution, at a time when there was far too much loose talk about prospective changes in the Court, he agreed. And after the ceremony on June 23, 1969, he said to me in the conference room, with great feeling, that he hoped all of our successors would follow that pattern. Then he and Mrs. Warren graciously provided a reception in the east conference room.

In the five years that followed we consulted frequently on the problems of administration and matters before the Judicial Conference of the United States. He had enlarged the functions of that Conference, and he had prevailed upon the Congress to add to it one district judge representative from each of the circuits, an important change that was long overdue. He had also enlarged the committee structure, so as to draw nearly 200 judges into the work of the Conference advisory committees.

When it became clear that a comprehensive program of seminars for the training of new judges and for all judges on special topics was not feasible under the structure of the Administrative Office of the United States Courts, he along with Warren Olney, then the Director of that office, worked out the blueprint for the Federal Judicial Center, which has contributed so much to improving the work of the courts since it began operations in 1968, under the directorship of Justice Tom Clark. That institution, the Federal Judicial Center, stands as tangible evidence of his foresight and his concern to improve the work of the courts.

In one of our many talks he commented on how much he enjoyed the flower bed that had been placed just outside his windows. Knowing that as a Californian he was accustomed to very colorful flowers most of the year, I had asked the gardener to put masses of color in that particular bed. In some way he became aware of this. He then jokingly asked how I found time to worry about flowers. When I reminded him that I walked around

the building almost daily to relax and to relieve my frustrations, just as he went to football games and went duck hunting, he laughed heartily and said: "You'd better find a bigger place to walk; this place is not large enough to work off the frustrations of a Chief Justice."

When he came to the Court, Earl Warren, like his predecessors, Taft, Hughes, and Vinson, divorced himself totally from the political world in which he had been a foremost figure for three decades, and devoted all of his great energies to judicial work.

The sole exception in 16 years, as the Attorney General has noted, was to accept appointment as Chairman of the Commission to investigate the murder of President Kennedy. The attacks on the report of that Commission did not disturb him unduly, partly because others could and did respond, as he said, and because political murders were so common in human history that there were always people around to exploit the conspiratorial explanation. He accepted that assignment from President Johnson with great reluctance, but he performed it superbly in the minds of all thoughtful people.

The memorial resolutions have referred to Nina Warren's place in Earl Warren's life, and in his public career. We on the Court know her as a most private person, one who planned and dedicated her life to help him carry the heavy burdens of his public career.

Our response today would not be complete without an acknowledgment of how much his accomplishments were the product of a truly joint enterprise and, because of Nina Warren, a most happy one.

In an interview shortly before his last illness, Earl Warren made a statement that expressed the essence of his philosophy. He said: "I believe that every generation of Americans has a greater opportunity than those who preceded. I have confidence in our country, in our people, and in our institutions; and I believe we can and will go on to still greater things."

It is axiomatic that the life and services of a significant public figure cannot be fully or accurately assessed in his lifetime. Not until the passage of time insulates judgments from contemporary events can this be done objectively. Yet it is very clear that Earl Warren's contribution can safely and fairly be assessed now, to give him a foremost place among the 15 Chief Justices and more than 80 Associate Justices who have served on this Court since 1790. That assessment is bound to grow with the passage of time.

Those who sat with him up to June 23, 1969, and those of us whose contacts with him were chiefly in the five years that followed mourn the loss of a friend and colleague. Yet even as we do that, we take pride in his rich life and in his selfless service to our country.

Mr. Attorney General, Mr. Solicitor General, the Court thanks you for your presentations here today in memory of Earl Warren.

We ask you to convey to the Chairman and to the Committee on Resolutions our deep appreciation for their work. Your motion that these Resolutions be made part of the permanent records of the Court is hereby granted.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1974

VELLA *v.* FORD MOTOR CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–1994. Argued February 18–19, 1975—
Decided April 15, 1975

A shipowner's duty to furnish an injured seaman maintenance and cure continues from the date the seaman leaves the ship to the date when a medical diagnosis is made that his injury was permanent immediately after his accident and therefore incurable. Pp. 3–6.

495 F. 2d 1374, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Leonard C. Jaques argued the cause and filed a brief for petitioner.

John A. Mundell, Jr., argued the cause and filed a brief for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We granted certiorari in this case limited to the question whether a shipowner's duty to furnish an injured seaman maintenance and cure continues from the date

the seaman leaves the ship to the date when a medical diagnosis is made that the seaman's injury was permanent immediately after his accident and therefore incurable.[1] 419 U. S. 894 (1974).

Petitioner was a seaman aboard respondent's Great Lakes vessel, S. S. *Robert S. McNamara.* He was discharged and left the ship on June 29, 1968. Thereafter he filed this suit in the District Court for the Eastern District of Michigan, Southern Division, based on a claim that on April 4, 1968, while replacing a lower engineroom deck plate, he slipped and fell on the oily floor plate causing his head to suffer a severe blow when it struck an electrical box. The complaint included a count, among others,[2] for maintenance and cure. The medical testimony at the trial was that petitioner suffered from a vestibular disorder defined as damage to the balancing mechanism of the inner ear. The testimony of respondent's medical witness, Dr. Heil, an otolaryngologist, supplied the only medical diagnosis as to the time when the disorder became permanent and not susceptible of curative treatment. Dr. Heil testified on April 27, 1972, that he had recently examined petitioner. He conceded that

[1] This question is subsumed in Question I presented in the petition for writ of certiorari:

"Is a disabled seaman who contracted by trauma a permanent disease while in the service of a vessel entitled to maintenance and cure payments during the interim between the period the incident occurred and the time the disease was medically diagnosed and proclaimed incurable?"

[2] Petitioner also sought damages under counts founded on the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, and on unseaworthiness under general maritime law. The Court of Appeals affirmed the judgment in favor of respondent entered on a jury verdict of no cause for action on either count. We denied review of the judgment of the Court of Appeals in respect of that affirmance when we denied the petition for writ of certiorari as respects Question II presented in the petition.

a severe blow to the head, such as alleged by petitioner, could have caused the disorder. He said, however, that the disorder is not a condition that can be cured by treatment.[3] The jury awarded petitioner maintenance and cure in the amount of $5,848. Respondent moved for a judgment notwithstanding the verdict on the ground that the award was not within the permissible scope of maintenance and cure. The District Court denied the motion and stated: "While it is true that maintenance and cure is not available for a sickness declared to be permanent, it is also true that maintenance and cure continues until such time as the incapacity is declared to be permanent." App. 20a. The Court of Appeals for the Sixth Circuit reversed without a published opinion, 495 F. 2d 1374 (1974). The Court of Appeals held that "once the seaman reaches 'maximum medical recovery,' the shipowner's obligation to provide maintenance and cure ceases," App. 28a, and since "[t]he record in this case does not permit an inference other than that [petitioner's] condition was permanent immediately after the accident," *id.*, at 29a, the District Court's holding impermissibly extended the shipowner's obligation.

We disagree with the Court of Appeals and therefore reverse. The shipowner's ancient duty to provide maintenance and cure for the seaman who becomes ill or is injured while in the service of the ship derives from the "unique hazards [which] attend the work of seamen," and fosters the "combined object of encouraging marine com-

[3] When asked whether petitioner might be cured by treatment, Dr. Heil testified:

"No, not really. Treatment is primarily symptomatic for this condition. That is, people with a vestibular disorder are apt to have intermittent episodes of dizziness which, on occasion, are somewhat more severe. Treatment is limited to those times when the patient is particularly dizzy. They can obtain some symptomatic relief with medication. Other than that, there is no specific cure or treatment."

merce and assuring the well-being of seamen." *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 727 (1943). To further that "combined object" we have held that the duty arises irrespective of the absence of shipowner negligence and indeed irrespective of whether the illness or injury is suffered in the course of the seaman's employment. *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 527 (1938). And, "[s]o broad is the shipowner's obligation, . . . negligence or acts short of culpable misconduct on the seaman's part will not relieve [the shipowner] of the responsibility." *Aguilar* v. *Standard Oil Co., supra*, at 730–731. Thus, the breadth and inclusiveness of the shipowner's duty assure its easy and ready administration for "[i]t has few exceptions or conditions to stir contentions, cause delays, and invite litigations." *Farrell* v. *United States*, 336 U. S. 511, 516 (1949).

Denial of maintenance and cure when the seaman's injury, though in fact permanent immediately after the accident, is not medically diagnosed as permanent until long after its occurrence would obviously disserve and frustrate the "combined object of encouraging marine commerce and assuring the well-being of seamen." A shipowner might withhold vitally necessary maintenance and cure on the belief, however well or poorly founded, that the seaman's injury is permanent and incurable. Or the seaman, if paid maintenance and cure by the shipowner, might be required to reimburse the payments, if it is later determined that the injury was permanent immediately after the accident. Thus uncertainty would displace the essential certainty of protection against the ravages of illness and injury that encourages seamen to undertake their hazardous calling. Moreover, easy and ready administration of the shipowner's duty would seriously suffer from the introduction of complexities and uncertainty that could "stir contentions, cause delays, and invite litigations."

The Shipowners' Liability Convention, made effective for the United States on October 29, 1939, *Farrell* v. *United States, supra,* at 517, buttresses our conclusion that the District Court correctly held that "maintenance and cure continues until such time as the incapacity is declared to be permanent." [4] That holding tracks the wording of Art. 4, ¶ 1, of the Convention which provides: "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, *or until the sickness or incapacity has been declared of a permanent character.*" 54 Stat. 1696. (Emphasis supplied.) The aim of the Convention "was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level."

[4] On this record maintenance and cure could have been claimed to continue from June 29, 1968, the date petitioner left the vessel, to April 27, 1972, the date Dr. Heil testified that the vestibular disorder was permanent immediately after the accident and not susceptible of curative treatment. The jury, however, awarded petitioner maintenance and cure at $8 per day only for the period from June 29, 1968, to June 29, 1970. Petitioner's appeal to the Court of Appeals did not, however, draw into question a claim of entitlement to maintenance and cure for the longer period. App. 25a. In that circumstance petitioner is not entitled to the relief respecting the longer period sought by him in this Court, Brief for Petitioner 19. See *Le Tulle* v. *Scofield,* 308 U. S. 415, 421–422 (1940). Moreover, in light of our holding that the shipowner's duty continued until Dr. Heil's testimony, it is not necessary to address the question whether the jury award might also be sustained on the ground that the shipowner's duty in any event obliged him to provide palliative medical care to arrest further progress of the condition or to reduce pain, and we intimate no view whatever upon the shipowner's duty in that regard. Compare *Ward* v. *Union Barge Line Corp.,* 443 F. 2d 565, 572 (CA3 1971), with the opinion of the Court of Appeals in this case. App. 29a n. 1. Nor do we express any view whether a seaman may forfeit his right to maintenance and cure by not reporting a known injury or malady, or by refusing from the outset to allow proper medical examination, or by discontinuing medical care made available.

Warren v. *United States*, 340 U. S. 523, 527 (1951). Thus Art. 4, ¶ 1, is declaratory of a longstanding tradition respecting the scope of the shipowner's duty to furnish injured seamen maintenance and cure,[5] *Farrell* v. *United States*, *supra*, at 518, and therefore the District Court's interpretation was correct.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[5] See *Desmond* v. *United States*, 217 F. 2d 948, 950 (CA2 1954): "The shipowner is liable for maintenance and cure only until the disease is cured *or recognized as incurable*" (emphasis supplied); *Vitco* v. *Joncich*, 130 F. Supp. 945, 949 (SD Cal. 1955), aff'd, 234 F. 2d 161 (CA9 1956): "The shipowner's obligation to furnish maintenance is coextensive in time with his duty to furnish cure . . . and neither obligation is discharged *until the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been effected*" (emphasis supplied).

It is therefore unnecessary to address the conflict between commentators whether the Convention is applicable to Great Lakes shipping. Compare G. Gilmore & C. Black, The Law of Admiralty 323 (2d ed. 1975) ("Evidently the Convention was not to apply to . . . Great Lakes shipping"), with 4 E. Benedict, Admiralty 296 (6th ed. 1940) ("[T]he Convention would seem to apply to the Great Lakes, which are not 'inland waters' in the usual sense . . ."). The United States' reservation to the Convention provides: "[T]he United States Government understands and construes the words 'maritime navigation' appearing in this Convention to mean navigation on the high seas only." 54 Stat. 1704.

STANTON *v.* STANTON

APPEAL FROM THE SUPREME COURT OF UTAH

No. 73–1461. Argued February 19, 1975—Decided April 15, 1975

When appellant wife and appellee husband were divorced in Utah in 1960, the decree, incorporating the parties' stipulation, ordered appellee to make monthly payments to appellant for the support of the parties' children, a daughter, then age seven, and a son, then age five. Subsequently, when the daughter became 18, appellee discontinued payments for her support, and the divorce court, pursuant to a Utah statute which provides that the period of minority for males extends to age 21 and for females to age 18, denied appellant's motion for support of the daughter for the period after she attained 18. On appeal the Utah Supreme Court affirmed, rejecting appellant's contention, *inter alia,* that the statute violated the Equal Protection Clause of the Fourteenth Amendment. *Held:*

1. The support issue is not rendered moot by the fact that appellant and the daughter are now both over 21, since if appellee is obligated by the divorce decree to support the daughter between ages 18 and 21, there is an amount past due and owing. Nor does appellant lack standing because she is not of the age group affected by the statute; another statute obligates her to support the daughter to age 21. Pp. 11–12.

2. In the context of child support, the classification effectuated by the challenged statute denies the equal protection of the laws, as guaranteed by the Fourteenth Amendment. *Reed* v. *Reed,* 404 U. S. 71. Notwithstanding the "old notions" cited by the state court that it is the man's primary responsibility to provide a home, that it is salutary for him to have education and training before he assumes that responsibility, and that females tend to mature and marry earlier than males, there is nothing rational in the statutory distinction between males and females, which, when related to the divorce decree, results in appellee's liability for support for the daughter only to age 18 but for the son to age 21, thus imposing "criteria wholly unrelated to the objective of that statute." Pp. 13–17.

30 Utah 2d 315, 517 P. 2d 1010, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 18.

Bryce E. Roe argued the cause for appellant. With him on the brief was *William G. Fowler*.

J. Dennis Frederick argued the cause for appellee. On the brief was *D. Gary Christian*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a state statute specifying for males a greater age of majority than it specifies for females denies, in the context of a parent's obligation for support payments for his children, the equal protection of the laws guaranteed by § 1 of the Fourteenth Amendment.

I

Appellant Thelma B. Stanton and appellee James Lawrence Stanton, Jr., were married at Elko, Nev., in February 1951. At the suit of the appellant, they were divorced in Utah on November 29, 1960. They have a daughter, Sherri Lyn, born in February 1953, and a son, Rick Arlund, born in January 1955. Sherri became 18 on February 12, 1971, and Rick on January 29, 1973.

During the divorce proceedings in the District Court of Salt Lake County, the parties entered into a stipulation as to property, child support, and alimony. The court awarded custody of the children to their mother and incorporated provisions of the stipulation into its findings and conclusions and into its decree of divorce. Specifically, as to alimony and child support, the decree provided:

> "Defendant is ordered to pay to plaintiff the sum of $300.00 per month as child support and alimony,

> $100.00 per month for each child as child support and $100.00 per month as alimony, to be paid on or before the 1st day of each month through the office of the Salt Lake County Clerk." App. 6.

The appellant thereafter remarried; the court, pursuant to another stipulation, then modified the decree to relieve the appellee from payment of further alimony. The appellee also later remarried.

When Sherri attained 18 the appellee discontinued payments for her support. In May 1973 the appellant moved the divorce court for entry of judgment in her favor and against the appellee for, among other things, support for the children for the periods after each respectively attained the age of 18 years. The court concluded that on February 12, 1971, Sherri "became 18 years of age, and under the provisions of [§] 15–2–1 Utah Code Annotated 1953, thereby attained her majority. Defendant is not obligated to plaintiff for maintenance and support of Sherri Lyn Stanton since that date." App. 23. An order denying the appellant's motion was entered accordingly. *Id.*, at 24–25.

The appellant appealed to the Supreme Court of Utah. She contended, among other things, that Utah Code Ann. § 15–2–1 (1953)* to the effect that the period of minority for males extends to age 21 and for females to age 18, is invidiously discriminatory and serves to deny due process and equal protection of the laws, in violation of the Fourteenth Amendment and of the corresponding

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*"15–2–1. Period of minority.—The period of minority extends in males to the age of twenty-one years and in females to that of eighteen years; but all minors obtain their majority by marriage."

As is so frequently the case with state statutes, little or no legislative history is available on § 15–2–1. The statute has its roots in a territorial Act approved February 6, 1852, Comp. Laws of Utah, 1876, § 1035.

provisions of the Utah Constitution, namely, Art. I, §§ 7 and 24, and Art. IV, § 1. On this issue, the Utah court affirmed. 30 Utah 2d 315, 517 P. 2d 1010 (1974). The court acknowledged: "There is no doubt that the questioned statute treats men and women differently," but said that people may be treated differently "so long as there is a reasonable basis for the classification, which is related to the purposes of the act, and it applies equally and uniformly to all persons within the class." *Id.*, at 318, 517 P. 2d, at 1012. The court referred to what it called some "old notions," namely, "that generally it is the man's primary responsibility to provide a home and its essentials," *ibid.;* that "it is a salutary thing for him to get a good education and/or training before he undertakes those responsibilities," *id.*, at 319, 517 P. 2d, at 1012; that "girls tend generally to mature physically, emotionally and mentally before boys"; and that "they generally tend to marry earlier," *ibid.* It concluded:

> "[I]t is our judgment that there is no basis upon which we would be justified in concluding that the statute is so beyond a reasonable doubt in conflict with constitutional provisions that it should be stricken down as invalid." *Id.*, at 319, 517 P. 2d, at 1013.

If such a change were desirable, the court said, "that is a matter which should commend itself to the attention of the legislature." *Id.*, at 320, 517 P. 2d, at 1013. The appellant, thus, was held not entitled to support for Sherri for the period after she attained 18, but was entitled to support for Rick "during his minority" unless otherwise ordered by the trial court. *Ibid.*, 517 P. 2d, at 1014.

We noted probable jurisdiction. 419 U. S. 893 (1974).

II

The appellee initially suggests that the support issue is moot and that, in any event, the appellant lacks standing. These arguments are related and we reject both of them.

A. The mootness suggestion is based on the propositions that both the appellant and Sherri are now over 21 and that neither possesses rights that "can be affected by the outcome of this proceeding." Brief for Appellee 9. At the time the case was before us on the jurisdictional statement, the appellee suggested that the case involved a nonjusticiable political question. Appellee's Motion to Dismiss 6–7. Each approach, of course, overlooks the fact that what is at issue is support for the daughter during her years between 18 and 21. If appellee, under the divorce decree, is obligated for Sherri's support during that period, it is an obligation that has not been fulfilled, and there is an amount past due and owing from the appellee. The obligation issue, then, plainly presents a continuing live case or controversy. It is neither moot nor nonjusticiable.

B. The suggestion as to standing is that the appellant is not of the age group affected by the Utah statute and that she therefore lacks a personal stake in the resolution of the issue. It is said that when the appellant signed the stipulation as to support payments, she took the Utah law as it was and thus waived, or is estopped from asserting, any right to support payments after the daughter attained age 18.

We are satisfied that it makes no difference whether the appellant's interest in any obligation of the appellee, under the divorce decree, for Sherri's support between ages 18 and 21, is regarded as an interest personal to appellant or as that of a fiduciary. The Utah court has described support money as "compensation to a spouse

for the support of minor children." *Anderson* v. *Anderson,* 110 Utah 300, 306, 172 P. 2d 132, 135 (1946). And the right to past due support money appears to be the supplying spouse's not the child's. *Larsen* v. *Larsen,* 5 Utah 2d 224, 228, 300 P. 2d 596, 598 (1956). See also *Baggs* v. *Anderson,* 528 P. 2d 141, 143 (Utah 1974). The appellant, therefore, clearly has a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U. S. 186, 204 (1962); *Flast* v. *Cohen,* 392 U. S. 83, 102 (1968). We see nothing in the stipulation itself that is directed to the question when majority is reached for purposes of support payments or that smacks of waiver. In addition, the Uniform Civil Liability for Support Act has been in effect in Utah since 1957. Laws of Utah, 1957, c. 110, now codified as Utah Code Ann. §§ 78–45–1 through 78–45–13 (Supp. 1973). Section 78–45–4 specifically provides: "Every woman shall support her child." This is in addition to the mandate contained in § 78–45–3: "Every man shall support his wife and his child." "Child" is defined to mean "a son or daughter under the age of twenty-one years." § 78–45–2 (4). And § 78–45–12 states: "The rights herein created are in addition to and not in substitution [of] any other rights."

The appellant herself thus had a legal obligation under Utah law to support her daughter until Sherri became 21. That obligation, however, obviously was not in derogation of any right she might have against the appellee under the divorce decree. Her interest in the controversy, therefore, is distinct and significant and is one that assures "concrete adverseness" and proper standing on her part.

III

We turn to the merits. The appellant argues that Utah's statutory prescription establishing different ages of majority for males and females denies equal protection; that it is a classification based solely on sex and affects a child's "fundamental right" to be fed, clothed, and sheltered by its parents; that no compelling state interest supports the classification; and that the statute can withstand no judicial scrutiny, "close" or otherwise, for it has no relationship to any ascertainable legislative objective. The appellee contends that the test is that of rationality and that the age classification has a rational basis and endures any attack based on equal protection.

We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect. See *Weinberger* v. *Wiesenfeld,* 420 U. S. 636 (1975); *Schlesinger* v. *Ballard,* 419 U. S. 498 (1975); *Geduldig* v. *Aiello,* 417 U. S. 484 (1974); *Kahn* v. *Shevin,* 416 U. S. 351 (1974); *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Reed* v. *Reed,* 404 U. S. 71 (1971).

Reed, we feel, is controlling here. That case presented an equal protection challenge to a provision of the Idaho probate code which gave preference to males over females when persons otherwise of the same entitlement applied for appointment as administrator of a decedent's estate. No regard was paid under the statute to the applicants' respective individual qualifications. In upholding the challenge, the Court reasoned that the Idaho statute accorded different treatment on the basis of sex and that it "thus establishes a classification subject to scrutiny under the Equal Protection Clause." *Id.,* at 75. The Clause, it was said, denies to States "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute." *Id.,*

at 75–76. "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920)." *Id.*, at 76. It was not enough to save the statute that among its objectives were the elimination both of an area of possible family controversy and of a hearing on the comparative merits of petitioning relatives.

The test here, then, is whether the difference in sex between children warrants the distinction in the appellee's obligation to support that is drawn by the Utah statute. We conclude that it does not. It may be true, as the Utah court observed and as is argued here, that it is the man's primary responsibility to provide a home and that it is salutary for him to have education and training before he assumes that responsibility; that girls tend to mature earlier than boys; and that females tend to marry earlier than males. The last mentioned factor, however, under the Utah statute loses whatever weight it otherwise might have, for the statute states that "all minors obtain their majority by marriage"; thus minority, and all that goes with it, is abruptly lost by marriage of a person of either sex at whatever tender age the marriage occurs.

Notwithstanding the "old notions" to which the Utah court referred, we perceive nothing rational in the distinction drawn by § 15–2–1 which, when related to the divorce decree, results in the appellee's liability for support for Sherri only to age 18 but for Rick to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the

marketplace and the world of ideas. See *Taylor* v. *Louisiana,* 419 U. S. 522, 535 n. 17 (1975). Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance, particularly when marriage, as the statute provides, terminates minority for a person of either sex.

Only Arkansas, as far as our investigation reveals, remains with Utah in fixing the age of majority for females at 18 and for males at 21. Ark. Stat. Ann. § 57–103 (1971). See *Petty* v. *Petty,* 252 Ark. 1032, 482 S. W. 2d 119 (1972). Furthermore, Utah itself draws the 18–21 distinction only in § 15–2–1 defining minority, and in § 30–1–9 relating to marriage without the consent of parent or guardian. See also § 30–1–2 (4) making void a marriage where the male is under 16 or the female under 14. Elsewhere, in the State's present constitutional and statutory structure, the male and the female appear to be treated alike. The State's Constitution provides that the rights of Utah citizens to vote and hold office "shall not

be denied or abridged on account of sex," and that "[b]oth male and female citizens . . . shall enjoy equally all civil, political and religious rights and privileges," Art. IV, § 1, and, since long before the Nation's adoption of the Twenty-sixth Amendment in 1971, did provide that every citizen "of the age of twenty-one years and upwards," who satisfies durational requirements, "shall be entitled to vote." Art. IV, § 2. Utah's statutes provide that any citizen over the age of 21 who meets specified nonsex qualifications is "competent to act as a juror," Utah Code Ann. § 78–46–8, may be admitted to the practice of law, § 78–51–10, and may act as an incorporator, § 16–10–48, and, if under 21 and in need, may be entitled to public assistance, § 55–15a–17. The ages at which persons may serve in legislative, executive, and judicial offices are the same for males and females. Utah Const., Art. VI, § 5, Art. VII, § 3, and Art. VIII, § 2. Tobacco may not be sold, purchased, or possessed by persons of either sex under 19 years of age. §§ 76–10–104 and 76–10–105 (see Laws of Utah, 1974, §§ 39–40). No age differential is imposed with respect to the issuance of motor vehicle licenses. § 41–2–10. State adult education programs are open to every person 18 years of age or over. § 53–30–5. The Uniform Gifts to Minors Act is in effect in Utah and defines a minor, for its purposes, as any person "who has not attained the age of twenty-one years." § 75–15–2.11 (Supp. 1973). Juvenile court jurisdiction extends to persons of either sex under a designated age. §§ 55–10–64 and 55–10–77. Every person over the age of 18 and of sound mind may dispose of his property by will. § 74–1–1. And the Uniform Civil Liability for Support Act, noted above and in effect in Utah since 1957, imposes on each parent an obligation of support of both sons and daughters until age 21. §§ 78–45–2 (4), 78–45–3, and 78–45–4 (Supp. 1973).

This is not to say that § 15–2–1 does not have important effect in application. A "minor" may disaffirm his contracts. § 15–2–2. An "infant" must appear in court by guardian or guardian *ad litem*. Utah Rule Civ. Proc. 17 (b). A parent has a right of action for injury to, or wrongful death of, "a minor child." § 78–11–6. A person "[u]nder the age of majority" is not competent or entitled to serve as an administrator of a decedent's estate, § 75–4–4, or as the executor of a decedent's will. § 75–3–15 (1). The statute of limitations is tolled while a person entitled to bring an action is "[u]nder the age of majority." § 78–12–36. Thus, the distinction drawn by § 15–2–1 affects other rights and duties. It has pervasive effect, both direct and collateral.

We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—§ 15–2–1, in the context of child support, does not survive an equal protection attack. In that context, no valid distinction between male and female may be drawn.

IV

Our conclusion that in the context of child support the classification effectuated by § 15–2–1 denies the equal protection of the laws, as guaranteed by the Fourteenth Amendment, does not finally resolve the controversy as between this appellant and this appellee. With the age differential held invalid, it is not for this Court to determine *when* the appellee's obligation for his children's support, pursuant to the divorce decree, terminates under Utah law. The appellant asserts that, with the classification eliminated, the common law applies and that at common law the age of majority for both males and females is 21. The appellee claims that any unconstitutional inequality between males and females is to be remedied by treating males as adults at age 18, rather than by withholding the privileges of adulthood from

women until they reach 21. This plainly is an issue of state law to be resolved by the Utah courts on remand; the issue was noted, incidentally, by the Supreme Court of Utah. 30 Utah 2d, at 319, 517 P. 2d, at 1013. The appellant, although prevailing here on the federal constitutional issue, may or may not ultimately win her lawsuit. See *Harrigfeld* v. *District Court*, 95 Idaho 540, 511 P. 2d 822 (1973); *Commonwealth* v. *Butler*, 458 Pa. 289, 328 A. 2d 851 (1974); *Skinner* v. *Oklahoma*, 316 U. S. 535, 542–543 (1942).

The judgment of the Supreme Court of Utah is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court views this case as requiring a determination of whether the Utah statute specifying that males must reach a higher age than females before attaining their majority denies females the equal protection of the laws guaranteed by § 1 of the Fourteenth Amendment to the United States Constitution. The Court regards the constitutionality of Utah Code Ann. § 15–2–1 (1953) as properly at issue because of the manner in which the Supreme Court of Utah approached and decided the case. But this Court is subject to constraints with respect to constitutional adjudication which may well not bind the Supreme Court of Utah. This Court is bound by the rule, "to which it has rigidly adhered, . . . never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Liverpool, N. Y. & Phila. S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885), and we try to avoid deciding constitutional questions which "come to us in highly abstract form," *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 575 (1947). Fidelity to these longstanding

rules dictates that we have some regard for the factual background of this case, as fully outlined in the Court's opinion, before deciding the constitutional question that has been tendered to us.

The Utah statute which the Court invalidates "in the context of child support," *ante*, at 17, does not by its terms define the age at which the obligation of a divorced parent to support a child ceases. The parties concede that the Stantons could have provided in their property settlement agreement that appellee's obligation to support Sherri and Rick would terminate when both turned 18, when both turned 21, or when one turned 18 and the other turned 21. Tr. of Oral Arg. 4, 14, 23. This case arises only because appellant and appellee made no provision in their property settlement agreement fixing the age at which appellee's obligation to support his son or daughter would terminate. The Supreme Court of Utah, faced with the necessity of filling in this blank, referred to the State's general age-of-majority statute in supplying the terms which the parties had neglected to specify themselves.

Had the Supreme Court of Utah relied upon the statute only insofar as it cast light on the intention of the parties regarding the child support obligations contained in the divorce decree, there would be no basis for reaching the constitutionality of the statute. In supplying the missing term in an agreement executed between two private parties, a court ordinarily looks to the customs, mores, and practice of the parties in an attempt to ascertain what was intended. If, upon consideration of these factors, including the age-of-majority statute, the Utah Supreme Court had concluded that the Stantons intended to bestow more of their limited resources upon a son than a daughter, perhaps for the reasons stated in the opinion of that court, that strikes

me as an entirely permissible basis upon which to construe the property settlement agreement.

On the other hand, the Supreme Court of Utah may have concluded that, the parties having failed to specify this term of the agreement, the question became one of Utah statutory law rather than one of determining the intent of the parties. If that were its determination, the constitutionality of Utah Code Ann. § 15–2–1 (1953), would indeed be implicated in this case.

I do not think it possible to say with confidence which of these two approaches was taken by the Supreme Court of Utah in this case. In addition to this difficulty, there is another element of attenuation between the claim asserted on behalf of Sherri to be treated like her brother for purposes of child support, and the actual case before us. Utah has a comprehensive scheme dealing with child support in its Uniform Civil Liability for Support Act, Utah Code Ann. § 78–45–1 *et seq.* (Supp. 1973). Under that Act, "child" is defined as "a son or daughter under the age of twenty-one years," § 78–45–2 (4). Thus, for purposes of any direct claim by Sherri against appellee, Utah law treats her precisely as it does her brother. The claim asserted in this case is not by Sherri, but by her mother, and the source of any claim which the mother has against appellee necessarily arises out of the voluntary property settlement agreement which they executed at the time of their divorce.

These factors lead me to conclude that the issue which the Court says is presented by this case, and which it decides, cannot properly be decided on these facts if we are to adhere to our established policy of avoiding unnecessary constitutional adjudication. I would dismiss the appeal for that reason. *Rescue Army* v. *Municipal Court, supra; Socialist Labor Party* v. *Gilligan,* 406 U. S. 583 (1972).

Syllabus

McLUCAS, SECRETARY OF THE AIR FORCE, ET AL. *v.* DeCHAMPLAIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 73–1346. Argued December 9, 1974—Decided April 15, 1975

Appellee, an Air Force master sergeant whose court-martial conviction for violations of Art. 134 of the Uniform Code of Military Justice involving, *inter alia*, unauthorized use of classified documents and information, had been reversed for improper admission of certain evidence, and whose retrial was about to commence, filed this action for injunctive relief in Federal District Court against appellant military authorities, asserting that Art. 134 was unconstitutionally vague and that certain limitations imposed by the military authorities on the defense's pretrial access to classified documents in issue, denied him due process and effective assistance of counsel. The District Court preliminarily enjoined appellants from proceeding with the court-martial on the Art. 134 charges, and also on any other charges unless civilian defense counsel and certain other persons were allowed unlimited access to documents material to the defense. The court held that the circumstances justified an exception to the rule requiring a serviceman to exhaust his military remedies before a federal court will interfere with court-martial proceedings, that the unconstitutionality of Art. 134 was clear from the Courts of Appeals decisions in *Avrech* v. *Secretary of the Navy*, 155 U. S. App. D. C. 352, 477 F. 2d 1237, and *Levy* v. *Parker*, 478 F. 2d 772, that the restrictions placed on access to documents were excessive, and that appellee had adequately shown irreparable injury. Appellants directly appealed to this Court under 28 U. S. C. § 1252, which allows appeal from "an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." *Held:*

1. Whether a three-judge district court was or was not required under 28 U. S. C. § 2282 as to appellee's Art. 134 claim, the case is properly before this Court on appeal under 28 U. S. C. § 1252, since it is a civil action, appellants are officers of the United States

acting in their official capacities, Art. 134 is an "Act of Congress," and "the basis of the decision below in fact was that the Act of Congress was unconstitutional," *United States* v. *Raines*, 362 U. S. 17, 20. Pp. 27–32.

2. Under this Court's decisions in *Parker* v. *Levy*, 417 U. S. 733, and *Secretary of the Navy* v. *Avrech*, 418 U. S. 676, holding that Art. 134 is not unconstitutionally vague, appellee's constitutional claim as to Art. 134 is clearly insubstantial and must be dismissed. P. 32.

3. Relief as to appellee's access claim is squarely precluded by this Court's holding in *Schlesinger* v. *Councilman*, 420 U. S. 738, that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention," and hence the "unlimited access" aspect of appellee's suit must be dismissed for failure to state a claim upon which relief can be granted. Pp. 33–34.

367 F. Supp. 1291, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 34.

Solicitor General Bork argued the cause for appellants. With him on the brief were *Assistant Attorney General Hills*, *Leonard Schaitman*, and *Anthony J. Steinmeyer*.

Leonard B. Boudin argued the cause for appellee. With him on the brief was *David Rein*.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The District Court for the District of Columbia preliminarily enjoined appellants, the Secretary of the Air Force and five Air Force officers,[1] from proceeding with

**Melvin L. Wulf* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] The Chief of Staff, Department of the Air Force, the Judge Advocate General of the Air Force, and the following officers

appellee DeChamplain's court-martial (i) on charges based upon Art. 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934, and (ii) on any charges whatever unless appellants allowed civilian defense counsel and certain other persons unlimited access to documents material to DeChamplain's defense. 367 F. Supp. 1291 (1973). The military authorities appealed directly to this Court, averring jurisdiction under 28 U. S. C. § 1252. We postponed the jurisdictional question to the hearing on the merits. 418 U. S. 904 (1974). We hold the case properly here under § 1252 and, finding its disposition controlled by our intervening decisions in *Parker* v. *Levy*, 417 U. S. 733 (1974), and *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975), vacate the preliminary injunction and remand with directions to dismiss the action.

I

Article 134 provides, *inter alia*, that "crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense . . . ." This clause of the article is an assimilative crimes provision, conferring court-martial jurisdiction over service-connected, non-capital federal offenses not covered by specific provisions of the Code.[2] In 1971, court-martial charges were pre-

stationed at Richards-Gebaur Air Force Base, Mo.: Colonel Hewitt E. Lovelace, Jr., the convening authority; Major Forrest W. Thomas, Staff Judge Advocate; and Colonel Russell A. Stanley, presiding military judge.

[2] See *United States* v. *Frantz*, 2 U. S. C. M. A. 161, 7 C. M. R. 37 (1953). The full text of the article provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of

ferred under this provision against appellee DeChamplain, an Air Force master sergeant. Specifically, DeChamplain was charged with having copied classified documents, in violation of 18 U. S. C. § 793 (b), and with having attempted to deliver such copies to an unauthorized person, in violation of 18 U. S. C. § 793 (d). DeChamplain was also charged, under Art. 81 of the Uniform Code, 10 U. S. C. § 881, with conspiracy to communicate classified information to an agent of a foreign government, in violation of Art. 134 and 50 U. S. C. § 783 (b), and, under Art. 92, 10 U. S. C. § 892, with failure to obey an Air Force regulation requiring that contacts with foreign agents be reported. All of these charges were premised on allegations that, while stationed in Thailand, DeChamplain twice had been in the company of a Soviet embassy official and subsequently was found in possession of 24 official Air Force documents, ranging in classification from "confidential" to "top secret." The general court-martial convicted DeChamplain of all charges. On appeal, the Air Force Court of Military Review held that certain inculpatory statements made by DeChamplain should not have been admitted into evidence; the court therefore reversed the conviction and remanded for a new trial.[3] The Court of Military Appeals affirmed.[4]

The military authorities then prepared to retry DeChamplain before a general court-martial on substantially the same charges. The charges were amended, however, to delete all allegations pertaining to three of the classified documents, the Air Force choosing to forgo prosecution as to these documents rather than compromise their confidentiality. The Air Force also decided not to intro-

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by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[3] 46 C. M. R. 784 (1972).

[4] 22 U. S. C. M. A. 150, 46 C. M. R. 150 (1973).

duce at the new trial 12 of the documents, assertedly because of their connection with DeChamplain's inadmissible inculpatory statements. Copies of all of these documents are contained in the record of DeChamplain's first court-martial, to which the Air Force has given DeChamplain's military counsel full access. Civilian defense counsel, however, were allowed access only to unclassified portions of the record and thus were not permitted to inspect those documents that will not be in issue at the retrial. The Air Force authorized DeChamplain, his military counsel, chief civilian counsel, one legal associate, and one secretary to have access to the nine remaining documents that the charges against DeChamplain now concern. It imposed restrictions, however, on the use of the documents: they were to be examined only in the presence of persons with appropriate security clearances; no copies were to be made; written notes pertaining to classified information were to remain in Air Force custody; and the information was not to be discussed with anyone other than those who had been authorized access.

At a pretrial hearing conducted pursuant to 10 U. S. C. § 839, DeChamplain challenged these restrictions. The presiding military judge sustained the restrictions, but granted the civilian defense team access to portions of the original record pertaining to the nine documents still at issue, subject to the restrictions applicable to the documents themselves. DeChamplain also moved to dismiss the charges on various grounds, claiming, *inter alia,* that Art. 134 was unconstitutional. The presiding judge denied the motion. DeChamplain made the same claims in three petitions to the Court of Military Appeals for extraordinary relief. That court denied the petitions,[5] stat-

[5] *DeChamplain* v. *United States,* 22 U. S. C. M. A. 211, 46 C. M. R. 211 (1973); *DeChamplain* v. *United States,* 22 U. S. C.

ing on the last occasion that "[a] petition for extraordinary relief is not a substitute for appeal." [6]

DeChamplain's second court-martial was to begin on November 15, 1973. On October 3, he filed this action in the District Court seeking injunctive relief and asserting, among other claims, that Art. 134 was unconstitutionally vague and that the limitations on access to and use of the classified documents denied him due process and effective assistance of counsel. The defendant military authorities moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. The court denied the motion. It agreed with the military authorities that "generally a serviceman must first exhaust his military remedies before a federal court will interfere with court martial proceedings." 367 F. Supp., at 1294. The court believed, however, that the circumstances of the case justified an exception to the rule. Because the issues presented in the case were "purely legal" and did "not necessitate determinations which the military forum is best equipped to make," and because "Sergeant DeChamplain [would] be denied fundamental constitutional guarantees" unless the court intervened, the court concluded that there was no justification for deferring consideration of the issues until after DeChamplain's court-martial and subsequent military appellate review. *Ibid.*

The District Court further concluded that DeChamplain had satisfied the requirements for a preliminary injunction. It ruled that the unconstitutionality of Art. 134 was clear from the decisions of the Courts of Appeals in *Avrech* v. *Secretary of the Navy*, 155 U. S. App. D. C. 352, 477 F. 2d 1237 (1973), and *Levy* v. *Parker*,

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M. A. 656, 46 C. M. R. 1329 (1973); *DeChamplain* v. *McLucas*, 22 U. S. C. M. A. 462, 47 C. M. R. 552 (1973).

[6] *Ibid.*

478 F. 2d 772 (CA3 1973), both of which were then pending on certiorari in this Court. The District Court further held that the restrictions on access to the nine documents that the charges now concern and to the record of the previous court-martial were "clearly excessive" and abridged DeChamplain's right to a fair trial.

Finally, the court concluded that DeChamplain adequately had demonstrated irreparable injury: he had been in confinement since before his original court-martial and, if again convicted, would remain confined pending review by the military appellate courts.[7] The District Court therefore preliminarily enjoined the military authorities from proceeding with the Art. 134 charges. It further enjoined prosecution "on any and all charges" unless the Air Force granted "full and unlimited access to all documents relevant and material to the case" to DeChamplain's civilian defense counsel "and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial." [8]

II

The case comes to us in a most unusual posture. Insofar as the complaint sought an injunction against en-

[7] The District Court also observed that in *United States* v. *Unrue*, 22 U. S. C. M. A. 654 (1973), the Court of Military Appeals declined to follow the decision of the Court of Appeals for the District of Columbia Circuit in *Avrech* v. *Secretary of the Navy*, 155 U. S. App. D. C. 352, 477 F. 2d 1237 (1973). The District Court stated that "[i]t simply offends basic notions of fairness to require plaintiff to endure a possible lengthy court martial and further expect that appellate relief be sought in a tribunal which has clearly and summarily rejected the claims asserted." 367 F. Supp. 1291, 1295 (DC 1973).

[8] Following the District Court's decision, the Air Force authorized two consultants selected by DeChamplain's counsel to have access to the classified materials that will be in issue at the court-martial, subject to the same restrictions imposed on civilian counsel.

forcement of Art. 134 on the ground of its asserted unconstitutionality, the case falls within the literal mandate of 28 U. S. C. § 2282. That section provides that "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges . . . ." Although neither of the parties to this suit applied to the District Court for convention of a three-judge court, the section's requirement is jurisdictional, and if it applies a single district judge has no power to act. See, *e. g.*, *Flemming* v. *Nestor*, 363 U. S. 603, 606–607 (1960); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 153 (1963). A single judge, however, can dismiss the action for want of justiciability or general subject-matter jurisdiction. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 100 (1974). We also have held that general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial, *i. e.*, obviously without merit or clearly concluded by this Court's previous decisions. *Ex parte Poresky*, 290 U. S. 30, 32 (1933); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962); *Goosby* v. *Osser*, 409 U. S. 512, 518–519 (1973).

The District Court here, however, obviously did not consider DeChamplain's constitutional claim insubstantial; on the contrary, the court denied the motion to dismiss and went on to grant a preliminary injunction. According to DeChamplain, a three-judge court was deemed unnecessary at the time the complaint was filed, not because his claim was insubstantial, but because the unconstitutionality of the statute appeared settled by the Court of Appeals decision in *Avrech* v. *Secretary of the Navy*, *supra*, a decision binding on the District Court.

Hence, it is said, the case seemed to present a variant, however attenuated, of *Bailey* v. *Patterson,* 369 U. S. 31 (1962), and the District Court thought itself empowered to act since the "decision could not possibly go in any manner save one." [9]

But the prediction proved to be ill-founded; subsequently, the Court of Appeals decision in *Avrech* was reversed by this Court. *Secretary of the Navy* v. *Avrech,* 418 U. S. 676 (1974). In consequence of this, appellee DeChamplain argued in his motion to dismiss and brief to this Court that the question of Art. 134's constitutionality *was* substantial and thus a three-judge court was required. Moreover, if this is so, appellee urges, this Court has no jurisdiction of the appeal, and the appeal must be dismissed.[10]

Appellee bases this argument on our decisions concerning appellate jurisdiction under 28 U. S. C. § 1253. That section allows a direct appeal to this Court "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." On its face, this provision would seem to allow a direct appeal to this Court if a single district judge grants or denies an injunction, when under 28 U. S. C. § 2281 or § 2282 the case was "required . . . to be heard and determined" by a three-judge court. This Court has read the statute, however, as allowing direct appeals only from

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[9] *Utica Mutual Insurance Co.* v. *Vincent,* 375 F. 2d 129, 131 n. 1 (CA2) (Friendly, J.), cert. denied, 389 U. S. 839 (1967). Our description of appellee's argument, of course, does not intimate any approval of the radical expansion of *Bailey* that it appears to represent.

[10] There is no question that our appellate jurisdiction as to the access issue depends entirely on whether an appeal properly lies as to the Art. 134 issue.

"orders actually entered by three-judge courts." *Gonzalez* v. *Automatic Employees Credit Union, supra,* at 96 n. 14. See *Stratton* v. *St. Louis S. W. R. Co.,* 282 U. S. 10, 15–16 (1930). And we have held that, when a single district judge fails to call for the convention of a three-judge court and goes on to dispose of the case, an appeal lies only to the court of appeals. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra; Hicks* v. *Pleasure House, Inc.,* 404 U. S. 1, 3 (1971).

Appellants here, however, premise this Court's jurisdiction on 28 U. S. C. § 1252, rather than § 1253. Section 1252 provides in pertinent part:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

The requisites of this provision are met in this case. This is a civil action; the appellant military authorities are, of course, officers of the United States, acting in their official capacities; and Art. 134 is an "Act of Congress." It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally "hold" the article unconstitutional. By its terms, however, § 1252 applies to interlocutory as well as final judgments, decrees, and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief. *Fleming* v. *Rhodes,* 331 U. S. 100 (1947). In

this case, as in *United States* v. *Raines*, 362 U. S. 17, 20 (1960), it is clear that "the basis of the decision below in fact was that the Act of Congress was unconstitutional . . . ."

In his motion to dismiss, appellee argued that § 1252 should be subject to the limitations placed on direct appeals to this Court under § 1253. In other words, § 1252 should not be read as allowing a direct appeal from an injunctive order erroneously entered by a single district judge, and instead appeal should be allowed only when the district court acted within its jurisdiction.[11] Such a gloss on § 1252 perhaps would be "consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court . . . ." *Gonzalez* v. *Automatic Employees Credit Union, supra,* at 98. We think, however, that in § 1252 Congress unambiguously mandated an exception to this policy in the narrow circumstances that the section identifies. The language of the statute sufficiently demonstrates its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality. The purpose of § 1252 is too plain to allow circumvention, whatever doubts may be entertained about the wisdom of mandatory direct review in other circumstances. Our previous cases have recognized that this Court's jurisdiction under § 1252 in no way depends on whether the district court had jurisdiction. On the contrary, an appeal under § 1252 brings before us, not only the constitutional question, but the whole case, *e. g., United States* v. *Raines, supra,* at 27 n. 7; see 9 J. Moore, Federal Practice ¶ 110.03 [5],

[11] Appellee's counsel vigorously argued this position in both his motion to dismiss and brief. At oral argument before this Court, however, counsel receded from this position and now agrees that the appeal properly was taken under § 1252. Tr. of Oral Arg. 17.

p. 96 (2d ed. 1973), including threshold issues of subject-matter jurisdiction, *United States* v. *American Friends Service Committee*, 419 U. S. 7, 12 n. 7 (1974), and whether a three-judge court was required, *Flemming* v. *Nestor*, 363 U. S. 603 (1960).[12] We follow these cases and hold that, whether the District Court did or did not have jurisdiction to act, this case is properly here under § 1252.

III

Proper disposition of the case does not require extended discussion. Appellants argue that, in fact, DeChamplain's constitutional claim was always insubstantial. The Courts of Appeals decisions in *Levy* v. *Parker* and *Avrech* v. *Secretary of the Navy*, which concluded that Art. 134 suffered from unconstitutional vagueness, concerned only the first two clauses of that article making punishable "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." DeChamplain, however, was charged under the assimilative crimes clause of the article, and was accused of having committed specific federal offenses. Thus, any possible vagueness in other parts of the article could not have affected DeChamplain. At this point, however, no purpose could be served by our deciding whether, when the complaint was filed, DeChamplain's constitutional claim was or was not substantial. Under our decisions in *Levy* and *Avrech*, DeChamplain's claim is, as he concedes,[13] clearly insubstantial now and must be dismissed.[14]

[12] As *Nestor* makes clear, if we were to conclude that § 2282 required a three-judge court, the proper course would be to vacate the judgment below and remand with directions that a three-judge court be convened. 363 U. S., at 606–607.

[13] Brief for Appellee 21.

[14] Because of this disposition of the matter, there is no occasion here to decide whether, if the unconstitutionality of Art. 134 had

We turn, finally, to the portion of the preliminary injunction requiring the military authorities to allow unlimited access to the original court-martial record and to documents that will be at issue at DeChamplain's court-martial. Since this claim is independent of the Art. 134 question and unrelated to the validity and interpretation of that article or to any other Act of Congress, a three-judge court was not required to hear it. As to this claim, however, the only harm DeChamplain claimed in support of his prayer for equitable relief was that, if convicted, he might remain incarcerated pending review within the military system. Thus, according to DeChamplain, intervention is justified now to ensure that he receives a trial free of constitutional error, and to avoid the possibility that he will be incarcerated, pending review, on the basis of a conviction that inevitably will be invalid. But if such harm were deemed sufficient to warrant equitable interference into pending court-martial proceedings, any constitutional ruling at the court-martial presumably would be subject to immediate relitigation in federal district courts, resulting in disruption to the court-martial and circumvention of the military appellate system provided by Congress.

We hold that relief as to the access claim is precluded squarely by our holding in *Schlesinger* v. *Councilman,* 420 U. S., at 758, that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention . . . ." The "unlimited access" aspect

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been established conclusively, as the District Court apparently believed, that would have justified an exception to the rule generally barring federal-court intervention into pending court-martial proceedings. Cf. *Younger* v. *Harris,* 401 U. S. 37, 53–54 (1971).

of DeChamplain's suit therefore must be dismissed for failure to state a claim upon which relief can be granted.

Vacated and remanded.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in the judgment.

Although I concur in the judgment, I would direct dismissal of DeChamplain's suit, not as the Court does on the ground that "the federal district courts must refrain from intervention," but because DeChamplain makes no claim denying the right of the military to try him at all. Therefore, his claim of right of access to and use of classified documents is properly to be presented to the military tribunals. See my concurring and dissenting opinion in *Schlesinger* v. *Councilman,* 420 U. S. 738, 762 (1975).

WITHROW ET AL. *v.* LARKIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 73–1573. Argued December 18, 1974—Decided April 16, 1975

Wisconsin statutes prohibit various acts of professional misconduct by physicians and empower a State Examining Board to warn and reprimand physicians, to temporarily suspend licenses, and to institute criminal action or action to revoke a license. When the Board notified appellee licensed physician that a closed investigative hearing, which appellee and his attorney could attend, would be held to determine whether appellee had engaged in certain proscribed acts, appellee brought an action against appellant Board members seeking injunctive relief and a temporary restraining order against the hearing on the ground that the statutes were unconstitutional and that appellants' acts with respect to appellee violated his constitutional rights. The District Court denied the restraining order, and the Board proceeded with the hearing, and after hearing testimony notified appellee that a "contested hearing" would be held at which the Board would determine whether his license would be temporarily suspended. The court then granted appellee's motion for a restraining order against the contested hearing on the ground that a substantial federal due process question had arisen. The Board complied with the order and did not proceed with the contested hearing but instead held a final investigative session and made "findings of fact" that appellee had engaged in certain proscribed conduct and "conclusions of law" that there was probable cause to believe he had violated certain criminal provisions. Subsequently, a three-judge court declared that the statute empowering the Board temporarily to suspend a physician's license without formal proceedings was unconstitutional and preliminarily enjoined the Board from enforcing it on the ground that it would be a denial of due process for the board to suspend appellee's license "at its own contested hearing on charges evolving from its own investigation." After appellants appealed from this decision the District Court modified the judgment so as to withdraw its declaration of unconstitutionality and to preliminarily enjoin its enforcement against appellee only, stating that appellee would suffer irreparable injury if the

statute were applied to him and that his challenge to its constitutionality had a high likelihood of success. *Held:*

1. The three-judge court's initial judgment should not have declared the statute unconstitutional and erroneously enjoined the Board from applying it against all licensees. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310. P. 43.

2. While a decision to vacate and remand for fuller emendation of the District Court's findings, conclusions, and judgment would be justified in view of their lack of specificity, such action, under the circumstances, would not add anything essential to the determination of the merits and would be a costly procedure to emphasize points already made and recognized by the parties as well as by the District Court. Pp. 44–46.

3. The District Court erred when it restrained the Board's contested hearing and when it preliminarily enjoined the enforcement of the statute against appellee, since on the record it is quite unlikely that appellee would ultimately prevail on the merits of the due process issue. Pp. 46–55.

(a) The combination of investigative and adjudicative functions does not, without more, constitute a due process violation as creating an unconstitutional risk of bias. Pp. 46–54.

(b) Here the processes utilized by the Board do not in themselves contain an unacceptable risk of bias, since, although the investigative hearing had been closed to the public, appellee and his attorney were permitted to be present throughout and in fact his attorney did attend the hearings and knew the facts presented to the Board; moreover, no specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing, the mere exposure to evidence presented in nonadversary investigative procedures being insufficient in itself to impugn the Board's fairness at a later adversary hearing. Pp. 54–55.

4. The fact that the Board, when prevented from going forward with the contested hearing, proceeded to issue formal findings of fact and conclusions of law that there was probable cause to believe appellee had engaged in various prohibited acts, does not show prejudice and prejudgment, and the Board stayed within accepted bounds of due process by issuing such findings and conclusions after investigation. The initial charge or determination of probable cause and the ultimate adjudication have different

bases and purposes, and the fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Pp. 55–58.

Reversed and remanded. See 368 F. Supp. 796.

WHITE, J., delivered the opinion for a unanimous Court.

Betty R. Brown, Solicitor General of Wisconsin, argued the cause for appellants. With her on the brief were *Robert W. Warren,* Attorney General, and *LeRoy L. Dalton,* Assistant Attorney General.

Robert H. Friebert argued the cause and filed a brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the Court.

The statutes of the State of Wisconsin forbid the practice of medicine without a license from an Examining Board composed of practicing physicians. The statutes also define and forbid various acts of professional misconduct, proscribe fee splitting, and make illegal the practice of medicine under any name other than the name under which a license has issued if the public would be misled, such practice would constitute unfair competition with another physician, or other detriment to the profession would result. To enforce these provisions, the Examining Board is empowered under Wis. Stat. Ann. §§ 448.17 and 448.18 (1974) to warn and reprimand, temporarily to suspend the license, and "to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute . . . ." [1] When an investigative proceeding before the

[1] "No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term 'treat the sick' is defined in s. 445.01 (1)(a), without a license or certificate of registration from

Examining Board was commenced against him, appellee brought this suit against appellants, the individual members of the Board, seeking an injunction against the enforcement of the statutes. The District Court issued a preliminary injunction, the appellants appealed, and we noted probable jurisdiction, 417 U. S. 943 (1974).

I

Appellee, a resident of Michigan and licensed to practice medicine there, obtained a Wisconsin license in August 1971 under a reciprocity agreement between Michigan and Wisconsin governing medical licensing. His practice in Wisconsin consisted of performing abor-

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the examining board, except as otherwise specifically provided by statute." Wis. Stat. Ann. § 448.02 (1).

"The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 488.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof." § 448.17.

"A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227." § 448.18 (7).

Section 448.18 (1)(g) prohibits "engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public." Fee splitting is proscribed by § 448.23 (1). Section 448.02 (4) regulates the use of a name by a physician in his practice other than the name under which he was licensed.

Appellee maintains that he has legal and factual defenses to all charges made against him. Brief for Appellee 28–29, n. 13.

tions at an office in Milwaukee. On June 20, 1973, the Board sent to appellee a notice that it would hold an investigative hearing on July 12, 1973, under Wis. Stat. Ann. § 448.17 to determine whether he had engaged in certain proscribed acts.[2] The hearing would be closed to the public, although appellee and his attorney could attend. They would not, however, be permitted to cross-examine witnesses. Based upon the evidence presented at the hearing, the Board would decide "whether to warn or reprimand if it finds such practice and whether to institute criminal action or action to revoke license if probable cause therefor exists under criminal or revocation statutes." App. 14.

On July 6, 1973, appellee filed his complaint in this action under 42 U. S. C. § 1983 seeking preliminary and permanent injunctive relief and a temporary restraining order preventing the Board from investigating him and from conducting the investigative hearing. The District Court denied the motion for a temporary restraining order.

On July 12, 1973, appellants moved to dismiss the complaint. On the same day, appellee filed an amended complaint in which injunctive relief was sought on the ground that Wis. Stat. Ann. §§ 448.17 and 448.18 were unconstitutional and that appellants' acts with respect to him violated his constitutional rights. The District Court again denied appellee's motion for a temporary restraining order, but did not act upon appellants' motion to dismiss. On July 30, 1973, appellants submitted an amended motion to dismiss.

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[2] The notice indicated that the hearing would be held "to determine whether the licensee has engaged in practices that are inimical to the public health, whether he has engaged in conduct unbecoming a person licensed to practice medicine, and whether he has engaged in conduct detrimental to the best interests of the public." App. 14.

The Board proceeded with its investigative hearing on July 12 and 13, 1973; numerous witnesses testified and appellee's counsel was present throughout the proceedings. Appellee's counsel was subsequently informed that appellee could, if he wished, appear before the Board to explain any of the evidence which had been presented. App. 36–37.

On September 18, 1973, the Board sent to appellee a notice that a "contested hearing" [3] would be held on October 4, 1973, to determine whether appellee had engaged in certain prohibited acts [4] and that based upon

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[3] Apart from his claim that the tribunal at the contested hearing would be biased, appellee has not contended that that hearing would not be a full adversary proceeding. See Wis. Stat. Ann. §§ 227.07–227.21. See also *Daly* v. *Natural Resources Board*, 60 Wis. 2d 208, 218, 208 N. W. 2d 839, 844 (1973), cert. denied, 414 U. S. 1137 (1974); *Margoles* v. *State Board of Medical Examiners*, 47 Wis. 2d 499, 508–511, 177 N. W. 2d 353, 358–359 (1970). No issue has been raised concerning the circumstances, if any, in which the Board could suspend a license without first holding an adversary hearing.

[4] The notice stated that the hearing would be held "to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M. D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson." It would also "determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M. D., permitted Young Wahn Ahn, M. D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972." Finally the Board would "determine whether the said Duane Larkin, M. D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1)." App. 45–46.

the evidence adduced at the hearing the Board would determine whether his license would be suspended temporarily under Wis. Stat. Ann. § 448.18 (7). Appellee moved for a restraining order against the contested hearing. The District Court granted the motion on October 1, 1973. Because the Board had moved from purely investigative proceedings to a hearing aimed at deciding whether suspension of appellee's license was appropriate, the District Court concluded that a substantial federal question had arisen, namely, whether the authority given to appellants both "to investigate physicians and present charges [and] to rule on those charges and impose punishment, at least to the extent of reprimanding or temporarily suspending" violated appellee's due process rights. Appellee's motion to request the convening of a three-judge court was also granted, and appellants' motion to dismiss was denied. 368 F. Supp. 793, 795–796 (ED Wis. 1973).

The Board complied and did not go forward with the contested hearing. Instead, it noticed and held a final investigative session on October 4, 1973, at which appellee's attorney, but not appellee, appeared.[5] The Board thereupon issued "Findings of Fact," "Conclusions of Law," and a "Decision" in which the Board found that appellee had engaged in specified conduct proscribed by the statute. The operative portion of its "Decision" was the following:

> "Within the meaning of sec. 448.17, Stats., it is hereby determined that there is probable cause to believe that licensee has violated the criminal provisions of ch. 448, Stats., and that there is probable cause for an action to revoke the license of the licensee for engaging in unprofessional conduct.

[5] Appellee unsuccessfully sought a temporary restraining order against this hearing. See Record on Appeal, Entry 21.

> "Therefore, it is the decision of this Board that the secretary verify this document and file it as a verified complaint with the District Attorney of Milwaukee County in accordance with sec. 448.18 (2), Stats., for the purpose of initiating an action to revoke the license of Duane R. Larkin, M. D., to practice medicine and surgery in the State of Wisconsin and initiating appropriate actions for violation of the criminal laws relating to the practice of medicine." App. 59–60.

On November 19, 1973, the three-judge District Court found (with an opinion following on December 21, 1973) that § 448.18 (7) was unconstitutional as a violation of due process guarantees and enjoined the Board from enforcing it. Its holding was:

> "[F]or the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as § 448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decision maker, we concluded that it was unconstitutional and unenforceable." 368 F. Supp. 796, 797 (ED Wis. 1973).

Judgment was entered on January 31, 1974, by which it was "Ordered and Adjudged that § 448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats."

Appellants took an appeal from that decision, and we noted probable jurisdiction on June 10, 1974. Subsequently, on July 25, 1974, the District Court, at the initial suggestion of appellants but joined in by a cross-motion of appellee, modified its judgment so as to with-

draw its declaration of unconstitutionality and to enjoin the enforcement of § 448.18 (7) against appellee only. The amended judgment declared that appellee would suffer irreparable injury if the statute were applied to him and that his challenge to the statute's constitutionality had a high likelihood of success.[6]

II

Appellants correctly assert that the District Court's initial judgment conflicted with this Court's holding in *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940), that a state statute should not be declared unconstitutional by a district court if a preliminary injunction is granted a plaintiff to protect his interests during the ensuing litigation. "The question before [the District Court] was not whether the act was constitutional or unconstitutional . . . but was whether the showing made raised serious questions, under the federal Constitution . . . and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants." *Id.*, at 316. The January 31, 1974, judgment should not have declared § 448.18 (7) unconstitutional and it erroneously enjoined the Board from utilizing the section against any licensee.

The District Court, however, has subsequently modified its judgment to eliminate the declaration of uncon-

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[6] The modified judgment reads as follows:

"IT IS ORDERED AND ADJUDGED that the defendants are preliminarily enjoined until further notice from utilizing the provisions of § 448.18 (7), Wis. Stats., against the plaintiff, Duane Larkin, M. D., on the grounds that the plaintiff would suffer irreparable injury if said statute were to be applied against him, and that the plaintiff's challenge to the constitutionality of said statute has a high likelihood of success." Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 21–22.

stitutionality and to enjoin application of the statute only as against appellee.[7] Since appellants are no longer forbidden to apply the statutes to other persons, this issue in the case has been effectively settled.

We have also concluded that the amended judgment makes inappropriate extended treatment of appellants' contentions that the District Court failed to make the findings and conclusions required by Fed. Rule Civ. Proc. 52 (a), and failed to include in the order granting the injunction the reasons for its issuance as required by Rule 65 (d).[8] The District Court's

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[7] See n. 6, *supra*.

[8] Appellants contend in addition that appellee's motion for a temporary restraining order and injunctive relief did not state with particularity the grounds for such relief as required by Fed. Rule Civ. Proc. 7 (b), and that the motion went beyond the subject matter of the action since the amended complaint challenged only the conducting of the *ex parte* investigative hearing by the Board. Our review of the record leads us to the conclusion that whatever deficiencies appellee's motion might have had, they are insufficient to require reversal of the District Court decision giving injunctive relief. We also find that the motion was within the subject matter of the case as defined by the amended complaint. See App. 23.

Appellants also contend that appellee offered *no* evidence upon which injunctive relief could be based. This case, however, turns upon questions of law and not upon complicated factual issues, and the District Court has found both that appellee's challenge to § 448.18 (7) has a high likelihood of success on the merits and that appellee would be irreparably injured absent injunctive relief. If the District Court is correct in its constitutional premise that an agency which has investigated possible offenses cannot fairly adjudicate the legal and factual issues involved, then its conclusion that appellee would suffer irreparable injury by having his license temporarily suspended by such an agency is not irrational, and we will not disturb it. Cf. *Gibson* v. *Berryhill*, 411 U. S. 564, 577 n. 16 (1973).

Finally, we do not agree with appellants' contention that the District Court should have entirely refrained from deciding the merits of this case and from interfering with the state administrative proceeding. *Id.*, at 575–577.

opinion and initial judgment were deficient in this respect, but its amended judgment found what the court said was contained in its prior opinion [9]—that appellee would suffer irreparable injury if the statute were to be applied against him and that appellee's "challenge to the constitutionality of said statute has a high likelihood of success." [10] Cf. *Brown* v. *Chote*, 411 U. S. 452, 456 (1973). While a decision to vacate and remand for fuller emendation of the findings, conclusions, and judgment would be justified in view of their lack of specificity,[11] we doubt that such action, in the circumstances present here, would add anything essential to the determination of the merits. The District Court's decision turned upon the sequence of functions followed by appellants and not upon any factual issue peculiar to this case. We have jurisdiction under 28 U. S. C. § 1253,[12] and a

[9] "In addition, the plaintiff requests that the modified judgment should recite specific grounds not previously included in the judgment but contained in the earlier memorandum decision of this court. . . . We conclude that the plaintiff's position is well taken." Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 19.

[10] See n. 6, *supra*.

[11] See *Schmidt* v. *Lessard*, 414 U. S. 473, 476–477 (1974); *Gunn* v. *University Committee*, 399 U. S. 383, 388–389 (1970).

[12] "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Under 28 U. S. C. §§ 2281 and 2284, a three-judge district court is required for entering a preliminary or permanent injunction against the enforcement of a state statute on the grounds of the unconstitutionality of the law. That requirement includes preliminary injunctions against enforcement of state statutes based on "a high likelihood of success" of the constitutional challenge to the statutes. See *Brown* v. *Chote*, 411 U. S. 452 (1973); *Goldstein* v. *Cox*, 396 U. S. 471 (1970); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310 (1940).

remand at this juncture would be a costly procedure to emphasize points that have already been made and recognized by both parties as well as by the District Court.

III

The District Court framed the constitutional issue, which it addressed as being whether "for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process." 368 F. Supp., at 797.[13] The question was initially answered affirmatively, and in its amended judgment the court asserted that there was a high probability that appellee would prevail on the question. Its opinion stated that the "state medical examining board [did] not qualify as [an independent] decisionmaker [and could not] properly rule with regard to the merits of the same charges it investigated and, as in this case, presented to the district attorney." *Id.*, at 798. We disagree. On the present record, it is quite unlikely that appellee would ultimately prevail on the merits of the due process issue presented to the District Court, and it was an abuse of discretion to issue the preliminary injunction.

Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berry-*

[13] After the District Court made its decision, the Board altered its procedures. It now assigns each new case to one of the members for investigation, and the remainder of the Board has no contact with the investigative process. Affidavit of John W. Rupel, M. D., Suggestion of Mootness or in the Alternative Motion to Reconsider Appellee's Motion to Dismiss or Affirm 7. That change, designed to accommodate the Board's procedures to the District Court's decision, does not affect this case.

hill, 411 U. S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison, supra*, at 136; cf. *Tumey* v. *Ohio*, 273 U. S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome [14] and in which he has been the target of personal abuse or criticism from the party before him.[15]

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Very similar claims have been squarely rejected in prior decisions of this Court. In *FTC* v. *Cement Institute*, 333 U. S. 683 (1948), the Federal Trade Com-

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[14] *Gibson* v. *Berryhill*, 411 U. S., at 579; *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972); *Tumey* v. *Ohio*, 273 U. S. 510 (1927). Cf. *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U. S. 145 (1968).

[15] *Taylor* v. *Hayes*, 418 U. S. 488, 501–503 (1974); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971); *Pickering* v. *Board of Education*, 391 U. S. 563, 578–579, n. 2 (1968). Cf. *Ungar* v. *Sarafite*, 376 U. S. 575, 584 (1964).

mission had instituted proceedings concerning the respondents' multiple basing-point delivered-price system. It was demanded that the Commission members disqualify themselves because long before the Commission had filed its complaint it had investigated the parties and reported to Congress and to the President, and its members had testified before congressional committees concerning the legality of such a pricing system. At least some of the members had disclosed their opinion that the system was illegal. The issue of bias was brought here and confronted "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations." *Id.*, at 700.

The Court rejected the claim, saying:

> "[T]he fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *Id.*, at 701.

In specific response to a due process argument, the Court asserted:

> "No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had ex-

> pressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.*, at 702–703 (footnote omitted).

This Court has also ruled that a hearing examiner who has recommended findings of fact after rejecting certain evidence as not being probative was not disqualified to preside at further hearings that were required when reviewing courts held that the evidence had been erroneously excluded. *NLRB* v. *Donnelly Garment Co.*, 330 U. S. 219, 236–237 (1947). The Court of Appeals had decided that the examiner should not again sit because it would be unfair to require the parties to try "issues of fact to those who may have prejudged them . . . ." 151 F. 2d 854, 870 (CA8 1945). But this Court unanimously reversed, saying:

> "Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing." 330 U. S., at 236–237.

More recently we have sustained against due process objection a system in which a Social Security examiner has responsibility for developing the facts and making a decision as to disability claims, and observed that the challenge to this combination of functions "assumes too much and would bring down too many procedures de-

signed, and working well, for a governmental structure of great and growing complexity." *Richardson* v. *Perales*, 402 U. S. 389, 410 (1971).[16]

[16] The decisions of the Courts of Appeals touching upon this question of bias arising from a combination of functions are also instructive. In *Pangburn* v. *CAB*, 311 F. 2d 349 (CA1 1962), the Civil Aeronautics Board had the responsibility of making an accident report and also reviewing the decision of a trial examiner that the pilot involved in the accident should have his airline transport pilot rating suspended. The pilot claimed that his right to procedural due process had been violated by the fact that the Board was not an impartial tribunal in deciding his appeal from the trial examiner's decision since it had previously issued its accident report finding pilot error to be the probable cause of the crash. The Court of Appeals found the Board's procedures to be constitutionally permissible:

"[W]e cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents." *Id.*, at 358.

See also *Duffield* v. *Charleston Area Medical Center, Inc.*, 503 F. 2d 512 (CA4 1974); *Kennecott Copper Corp.* v. *FTC*, 467 F. 2d 67, 79–80 (CA10 1972), cert. denied, 416 U. S. 909 (1974); *Intercontinental Industries* v. *American Stock Exchange*, 452 F. 2d 935 (CA5 1971), cert. denied, 409 U. S. 842 (1972); *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 131 U. S. App. D. C. 331, 338, 404 F. 2d 1308, 1315 (1968); *Skelly Oil Co.* v. *FPC*, 375 F. 2d 6, 17–18 (CA10 1967), modified on other grounds *sub nom. Permian Basin Area Rate Cases*, 390 U. S. 747 (1968); *Safeway Stores, Inc.* v. *FTC*, 366 F. 2d 795, 801–802 (CA9 1966), cert. denied, 386 U. S. 932 (1967); *R. A. Holman & Co.* v. *SEC*, 366 F. 2d 446, 452–453 (CA2 1966), cert. denied, 389 U. S. 991 (1967); *SEC* v. *R. A. Holman & Co.*, 116 U. S. App. D. C. 279, 323 F. 2d 284, cert. denied, 375 U. S. 943 (1963).

Those cases in which due process violations have been found are characterized by factors not present in the record before us in this litigation, and we need not pass upon their validity. In

That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely. Within the Federal Government itself, Congress has addressed the issue in several different ways, providing for varying degrees of

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American Cyanimid Co. v. *FTC,* 363 F. 2d 757 (CA6 1966), one of the commissioners had previously served actively as counsel for a Senate subcommittee investigating many of the same facts and issues before the Federal Trade Commission for consideration. In *Texaco, Inc.* v. *FTC,* 118 U. S. App. D. C. 366, 336 F. 2d 754 (1964), vacated on other grounds, 381 U. S. 739 (1965), the court found that a speech made by a commissioner clearly indicated that he had already to some extent reached a decision as to matters pending before that Commission. See also *Cinderella Career & Finishing Schools, Inc.* v. *FTC,* 138 U. S. App. D. C. 152, 158–161, 425 F. 2d 583, 589–592 (1970). *Amos Treat & Co.* v. *SEC,* 113 U. S. App. D. C. 100, 306 F. 2d 260 (1962), presented a situation in which one of the members of the Securities and Exchange Commission had previously participated as an employee in the investigation of charges pending before the Commission. In *Trans World Airlines* v. *CAB,* 102 U. S. App. D. C. 391, 254 F. 2d 90 (1958), a Civil Aeronautics Board member had signed a brief in behalf of one of the parties in the proceedings prior to assuming membership on the Board. See also *King* v. *Caesar Rodney School District,* 380 F. Supp. 1112 (Del. 1974).

For state-court decisions dealing with issues similar to those involved in this case, see *Koelling* v. *Board of Trustees,* 259 Iowa 1185, 146 N. W. 2d 284 (1966); *State* v. *Board of Medical Examiners,* 135 Mont. 381, 339 P. 2d 981 (1959); *Board of Medical Examiners* v. *Steward,* 203 Md. 574, 102 A. 2d 248 (1954). See also *LeBow* v. *Optometry Examining Board,* 52 Wis. 2d 569, 575, 191 N. W. 2d 47, 50 (1971); *Kachian* v. *Optometry Examining Board,* 44 Wis. 2d 1, 13, 170 N. W. 2d 743, 749 (1969).

separation from complete separation of functions to virtually none at all.[17] For the generality of agencies, Congress has been content with § 5 of the Administrative Procedure Act, 5 U. S. C. § 554 (d), which provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, but which also expressly exempts from this prohibition "the agency or a member or members of the body comprising the agency." [18]

It is not surprising, therefore, to find that "[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a denial of due process . . . ." 2 K. Davis, Administrative Law Treatise § 13.02, p. 175 (1958). Similarly, our cases, although they reflect the substance of the problem, offer no support for the bald proposition applied in this case by the District Court that agency members who participate in an investigation are disqualified from adjudicating. The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.

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[17] See 2 K. Davis, Administrative Law Treatise § 13.04 (1958); K. Davis, Administrative Law Treatise § 11.14 (1970 Supp.).

[18] The statute provides in pertinent part:

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency."

See also 2 K. Davis, *supra*, §§ 13.06–13.07.

Appellee relies heavily on *In re Murchison, supra,* in which a state judge, empowered under state law to sit as a "one-man grand jury" and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, passing on guilt or innocence, he very likely relied on "his own personal knowledge and impression of what had occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." 349 U. S., at 138.[19]

Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications. The Court did not purport to question the *Cement Institute* case, *supra,* or the Administrative Procedure Act and did not lay down any general principle that a judge before whom an alleged contempt is committed may not bring and preside over the ensuing contempt proceedings. The accepted rule is to the con-

[19] Appellee also relies upon statements made by the Court in *Pickering* v. *Board of Education,* 391 U. S., at 578–579, n. 2. In that case, however, unlike the present one, "the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal." *Ibid.* In any event, the Court did not analyze the question raised by this case because the appellant in *Pickering* had not raised a due process contention in the state proceedings.

The question of the constitutionality of combining in one agency both investigative and adjudicative functions in the same proceeding was raised but did not require answering in *Gibson* v. *Berryhill,* 411 U. S., at 579 n. 17.

trary. *Ungar* v. *Sarafite*, 376 U. S. 575, 584–585 (1964); *Nilva* v. *United States*, 352 U. S. 385, 395–396 (1957).

Nor is there anything in this case that comes within the strictures of *Murchison*.[20] When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee's license. Without doubt, the Board then anticipated that the proceeding would eventuate in an adjudication of the issue; but there was no more evidence of bias or the risk of bias or prejudgment than inhered in the very fact that the Board had investigated and would now adjudicate.[21] Of course, we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice. The processes utilized by the Board, however, do not in themselves contain an unacceptable risk of bias. The

[20] It is asserted by appellants, Brief for Appellants 25 n. 9, and not denied by appellee that an agency employee performed the actual investigation and gathering of evidence in this case and that an assistant attorney general then presented the evidence to the Board at the investigative hearings. While not essential to our decision upholding the constitutionality of the Board's sequence of functions, these facts, if true, show that the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication, including the possibility of Board members relying at later suspension hearings upon evidence not then fully subject to effective confrontation.

[21] Appellee does claim that state officials harassed him with litigation because he performed abortions. Brief for Appellee 8–9. He also has complained "about the notoriety of his case during the 'secret' [Board] proceedings." *Id.*, at 20 n. 8. The District Court made no findings with respect to these allegations, and the record does not provide a basis for finding as an initial matter here that there was evidence of actual bias or prejudgment on the part of appellants.

investigative proceeding had been closed to the public, but appellee and his counsel were permitted to be present throughout; counsel actually attended the hearings and knew the facts presented to the Board.[22] No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing. Without a showing to the contrary, state administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States* v. *Morgan*, 313 U. S. 409, 421 (1941).

We are of the view, therefore, that the District Court was in error when it entered the restraining order against the Board's contested hearing and when it granted the preliminary injunction based on the untenable view that it would be unconstitutional for the Board to suspend appellee's license "at its own contested hearing on charges evolving from its own investigation . . . ." The contested hearing should have been permitted to proceed.

IV

Nor do we think the situation substantially different because the Board, when it was prevented from going forward with the contested hearing, proceeded to make and issue formal findings of fact and conclusions of law asserting that there was probable cause to believe that

[22] After the initial investigative hearing, appellee was also given the opportunity to appear before the Board to "explain" the evidence that had been presented to it. App. 37.

appellee had engaged in various acts prohibited by the Wisconsin statutes.[23] These findings and conclusions were verified and filed with the district attorney for the purpose of initiating revocation and criminal proceedings. Although the District Court did not emphasize this aspect of the case before it, appellee stresses it in attempting to show prejudice and prejudgment. We are not persuaded.

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge's presiding over the criminal trial and, if the trial is without a jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.[24] We

[23] See *supra*, at 41–42.

[24] "The Act does not and probably should not forbid the combination with judging of instituting proceedings, negotiating settlements, or testifying. What heads of agencies do in approving the institution of proceedings is much like what judges do in ruling on demurrers or motions to dismiss. When the same examiner conducts a pre-hearing conference and then presides at the hearing, the harm,

should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. See *Cement Institute*, 333 U. S., at 702–703; *Donnelly Garment Co.*, 330 U. S., at 236–237.

Here, the Board stayed within the accepted bounds of due process. Having investigated, it issued findings and conclusions asserting the commission of certain acts and ultimately concluding that there was probable cause to believe that appellee had violated the statutes.

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine that appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit

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if any, is slight, and it probably goes more to impairment of effectiveness in mediation than to contamination of judging. If deciding officers may consult staff specialists who have not testified, they should be allowed to consult those who have testified; the need here is not for protection against contamination but is assurance of appropriate opportunity to meet what is considered." 2 K. Davis, Administrative Law Treatise § 13.11, p. 249 (1958).

of a more complete view of the evidence afforded by an adversary hearing.

The initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised. But in our view, that is not this case.[25]

That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52 (a) and 65 (d).[26]

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[25] Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973), and *Morrissey* v. *Brewer*, 408 U. S. 471 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. *Gagnon*, *supra*, at 785–786; *Morrissey*, *supra*, at 485–486; see also *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970). Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions.

[26] The District Court noted that the Board had presented its findings of fact and conclusions of law to the district attorney for

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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the purpose of initiating any appropriate revocation or criminal proceedings, 368 F. Supp., at 798, but made little of it and apparently did not deem the transmittal to a third party critical in light of "local realities." See *Gibson* v. *Berryhill*, 411 U. S., at 579. The District Court is, of course, free to give further attention to this issue upon remand.

TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–1742. Argued January 15, 1975—Decided April 16, 1975

Under the Clean Air Amendments of 1970, which establish a program for controlling air pollution, the Environmental Protection Agency (EPA) is required to set "ambient air" quality standards which, in the EPA's judgment, are "requisite to protect the public health," § 109 (b)(1) ("primary" standards), and "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air," § 109 (b)(2) ("secondary" standards). Each State after promulgation of these standards must submit an implementing and maintenance plan, which must be approved by the EPA if, *inter alia*, it meets eight general conditions set forth in § 110 (a)(2), the principal one of which is that the plan provide for the attainment of the national primary ambient air quality standards in the State "as expeditiously as practicable" but no later than three years from the date of the plan's approval. § 110 (a)(2)(A). The State's plan must include emission limitations, schedules, compliance timetables, and other measures insuring timely attainment and subsequent maintenance of the national standards. In order to develop the requisite plan within the statutory deadline, Georgia elected to follow an EPA-endorsed approach providing for immediately effective categorical emission limitations accompanied, however, by a variance procedure whereby particular sources could obtain individually tailored relief from the general requirements. Section 110 (a)(3) provides that the EPA shall approve any "revision" of an implementation plan that meets the § 110 (a)(2) requirements applicable to an original plan, and the EPA, concluding that that provision permits a State to grant individual variances meeting § 110 (a)(2) requirements from generally applicable emission standards, both before and after the attainment date, approved the Georgia plan. Respondents initiated review proceedings in the Court of Appeals, taking the position that variances applicable to individual sources may be approved only if they meet the much

more stringent procedural and substantive standards of § 110 (f), which, upon application prior to the compliance date for a stationary source or class of moving sources, permits "postponements" of no more than one year of any requirement of a plan, subject to specified conditions. That court upheld respondents' contentions and ordered the EPA to disapprove Georgia's variance provision. *Held:* The EPA's construction of the Act permitting treatment of individual variances from state requirements as "revisions," under § 110 (a)(3), of state implementation plans if they will not interfere with timely attainment and subsequent maintenance of national air quality standards, rather than as "postponements" under § 110 (f), was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the EPA. Pp. 75–99.

(a) Section 110 (f) is a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the mandatory deadlines for meeting national standards, and, contrary to respondents' contention, does not constitute the sole mechanism by which exceptions to a plan's requirements may be obtained. Pp. 78–84.

(b) This concept of § 110 (f)'s limited role is reinforced by comparison with § 110 (e), which permits a two-year extension of the three-year period referred to in § 110 (a)(2)(A)(i) on a showing far less stringent than that required for a § 110 (f) one-year postponement, which would be inexplicable were § 110 (f) the sole mechanism for States to modify their initial formulations of emission limitations. Pp. 84–86.

(c) Noting that § 110 (f) provides that a postponement may be granted with respect to the date that "any stationary source" must comply with "any requirement of an applicable state implementation plan," the Court of Appeals reached an erroneous conclusion that the § 110 (f) procedure was exclusive; the language of that provision does not mandate that all modifications of a plan's requirements necessarily be treated as postponements, precluding other forms of relief. Pp. 87–88.

(d) The Court of Appeals also erred in its conclusion that "a revision is a change in a generally applicable requirement," whereas a "postponement or variance" deals with particular parties, for here the implementation plans being revised are quite detailed; moreover, the court's analysis overlooks obvious distinctions between revisions and postponements in the statutory context. Pp. 88–90.

(e) Section 110 (a) (3) revisions are granted by the EPA only if they comport with the § 110 (a) (2) (A) requirement that the national standards be attained as expeditiously as practicable and thereafter maintained, so the "technology forcing" nature of the Amendments is no reason for judging under § 110 (f) variances which qualify for approval under § 110 (a) (3). Pp. 90–91.

(f) Congress felt that the EPA could feasibly and reliably perform the measurement and predictive functions necessary to pass on variances as revisions under § 110 (a) (3). Pp. 91–94.

(g) Respondents' argument that because any variance would delay attainment of national standards beyond what was previously considered as the earliest practicable date, and that because the Act requires attainment as soon as practicable, any variance must therefore be treated as a postponement, is not supported by the legislative history or otherwise. Pp. 94–97.

(h) Respondents' contention, based on § 110 (a) (2) (H), that revision authority is limited to general changes initiated by the EPA in order to "accelerate abatement or attain it in greater concert with other national goals," is specious. That provision, which does no more than impose a minimum requirement that state plans be capable of such modifications as are necessary to meet the basic goal of cleansing the ambient air to the extent necessary to protect public health, as expeditiously as possible within the three-year period, does not prevent the States from also permitting ameliorative revisions not contrary to that goal. Pp. 97–98.

489 F. 2d 390, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., dissented. POWELL, J., took no part in the consideration or decision of the case.

Gerald P. Norton argued the cause for petitioners. With him on the brief were *Solicitor General Bork, Assistant Attorney General Johnson,* and *Edmund B. Clark*

Richard E. Ayres argued the cause for respondents. With him on the brief was *Stephen P. Duggan.**

*Briefs of *amici curiae* urging reversal were filed by *John C. Danforth,* Attorney General, and *Walter W. Nowotny, Jr.,* and *Dan Summers,* Assistant Attorneys General, for the State of Missouri;

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case, 419 U. S. 823 (1974), to review a judgment of the Court of Appeals for the Fifth Circuit which required petitioner Administrator of the Environmental Protection Agency to disapprove a portion of the implementation plan submitted to him by the State of Georgia pursuant to the Clean Air Amendments of 1970.[1] The case presents an issue of statutory construction which is illuminated by the anatomy of the statute itself, by its legislative history, and by the history of congressional efforts to control air pollution.

I

Congress initially responded to the problem of air pollution by offering encouragement and assistance to the States. In 1955 the Surgeon General was authorized to study the problem of air pollution, to support research, training, and demonstration projects, and to provide technical assistance to state and local governments attempting to abate pollution. 69 Stat. 322. In 1960 Congress directed the Surgeon General to focus his attention on the health hazards resulting from motor vehicle emissions. Pub. L. 86–493, 74 Stat. 162. The Clean Air Act of 1963, 77 Stat. 392, authorized federal authorities to expand their research efforts, to make grants to state air pollu-

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by *John L. Hill*, Attorney General, *Larry F. York*, First Assistant Attorney General, and *Philip K. Maxwell* and *Douglas G. Caroom*, Assistant Attorneys General, for the State of Texas; by *Max N. Edwards* and *John Hardin Young* for the American Iron and Steel Institute; by *Cameron F. MacRae, Harry H. Voigt*, and *Henry V. Nickel* for the Edison Electric Institute; and by *R. Gordon Gooch* and *Larry B. Feldcamp* for Exxon Corp. et al.

[1] *Natural Resources Defense Council, Inc.* v. *EPA*, 489 F. 2d 390 (1974). We issued a stay of the contested portion of the court's judgment on June 10, 1974, 417 U. S. 942.

tion control agencies, and also to intervene directly to abate *interstate* pollution in limited circumstances. Amendments in 1965, § 101, 79 Stat. 992, and in 1966, 80 Stat. 954, broadened federal authority to control motor vehicle emissions and to make grants to state pollution control agencies.

The focus shifted somewhat in the Air Quality Act of 1967, 81 Stat. 485. It reiterated the premise of the earlier Clean Air Act "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." *Ibid.* Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so.

The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub. L. 91–604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle: "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ." § 107 (a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U. S. C. § 1857c–2 (a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to

attain air quality of specified standards, and to do so within a specified period of time.

The Amendments directed that within 30 days of their enactment the Environmental Protection Agency should publish proposed regulations describing national quality standards for the "ambient air," which is the statute's term for the outdoor air used by the general public. After allowing 90 days for comments on the proposed standards, the Agency was then obliged to promulgate such standards. § 109 (a)(1) of the Clean Air Act, as added, 84 Stat. 1679, 42 U. S. C. § 1857c–4 (a)(1). The standards were to be of two general types: "primary" standards, which in the judgment of the Agency were "requisite to protect the public health," § 109 (b)(1), and "secondary" standards, those that in the judgment of the Agency were "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." § 109 (b)(2).

Within nine months after the Agency's promulgation of primary and secondary air quality standards, each of the 50 States was required to submit to the Agency a plan designed to implement and maintain such standards within its boundaries. § 110 (a)(1) of the Clean Air Act, as added, 84 Stat. 1680, 42 U. S. C. § 1857c–5 (a)(1). The Agency was in turn required to approve each State's plan within four months of the deadline for submission, if it had been adopted after public hearings and if it satisfied eight general conditions set forth in § 110 (a)(2).[2]

[2] Section 110 (a)(2), 42 U. S. C. § 1857c–5 (a)(2), reads as follows:

"The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan, or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

"(A) (i) in the case of a plan implementing a national primary

Probably the principal of these conditions, and the heart of the 1970 Amendments, is that the plan provide for the attainment of the national primary ambient air

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ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

"(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

"(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

"(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

"(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

"(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority com-

quality standards in the particular State "as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan." § 110 (a)(2)(A). In providing for such attainment, a State's plan must include "emission limitations, schedules, and timetables for compliance with such limitations"; it must also contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards. § 110 (a)(2)(B).

Although the Agency itself was newly organized, the States looked to it for guidance in formulating the plans they were required to submit. On April 7, 1971—scarcely three months after the enactment of the Clean Air Amendments—the Agency published proposed guidelines for the preparation, adoption, and submission of such plans. 36 Fed. Reg. 6680. After receiving numerous comments, including those from respondent Natural Resources Defense Council, Inc. (NRDC), it issued final guidelines on August 14, 1971, 36 Fed. Reg. 1586. See 40 CFR Part 51 (1974). The national standards themselves were timely promulgated on April 30, 1971, 36 Fed. Reg. 8186. See 40 CFR Part 50 (1974).

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parable to that in section 303, and adequate contingency plans to implement such authority;

"(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

"(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements."

No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time. In the case of the States, it was soon realized that in order to develop the requisite plans within the statutory nine-month deadline, efforts would have to be focused on determining the stringent emission limitations necessary to comply with national standards. This was true even though compliance with the standards would not be necessary until the attainment date, which normally would be three years after Agency approval of a plan. The issue then arose as to how these stringent limitations, which often could not be satisfied without substantial research and investment, should be applied during the period prior to that date.

One approach was that adopted by Florida, under which the plan's emission limitations would not take effect until the attainment date. Under this approach, no source is subject to enforcement actions during the preattainment period, but all are put on notice of the limitations with which they must eventually comply.[3] Since the Florida approach basically does not require preattainment date pollution reductions on the part of those sources which might be able to effect them,[4] the Agency encouraged an alternative approach. Under it a State's emission limitations would be immediately effective. The State, how-

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[3] While sources would not be subject to enforcement actions based on their levels of emissions prior to the attainment date, they could be required to adhere to schedules for the planning, contracting, and construction necessary to assure that their emissions would be within permissible levels as of the attainment date. See 40 CFR §§ 51.15 (c), 52.524 (b) (1974).

[4] At least in the case of Florida, this approach has apparently been modified by subsequent adoption of schedules which require compliance by a number of specified sources prior to July 1, 1975. See 40 CFR § 52.524 (c) (1974).

ever, would have the authority to grant variances to particular sources which could not immediately comply with the stringent emission limitations necessary to meet the standards.

Georgia chose the Agency's preferred approach.[5] Its plan provided for immediately effective categorical emission limitations, but also incorporated a variance procedure whereby particular sources could obtain individually tailored relief from general requirements. This variance provision, Ga. Code Ann. § 88–912 (1971),[6] was one of the

[5] All other States within the Fifth Circuit, except Florida, also adopted plans with limitations which were effective immediately or, in the case of Texas, only a few months thereafter.

[6] Georgia Code Ann. § 88–912 (1971) reads as follows:

"Variances.—

"The department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific persons or class of persons or such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the department shall give consideration to the protection of the public health, safety and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the director of the department. The director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon

bases upon which the Agency's approval of the Georgia plan was successfully challenged by respondents in the Court of Appeals. It is the only aspect of that court's decision as to which the Agency petitioned for certiorari.

II

The Agency's approval of Georgia's variance provision was based on its interpretation of § 110 (a)(3),[7] which provides that the Agency shall approve any revision of an implementation plan which meets the § 110 (a)(2) requirements applicable to an original plan. The Agency concluded that § 110 (a)(3) permits a State to grant individual variances from generally applicable emission standards, both before and after the attainment date, so long as the variance does not cause the plan to fail to comply with the requirements of § 110 (a)(2). Since that section requires, *inter alia*, that primary ambient air standards be attained by a particular date, it is of some consequence under this approach whether the period for which the variance is sought extends beyond that date. If it does not, the practical effect of treating such preattainment date variances as revisions is that they can be granted rather freely.

This interpretation of § 110 (a)(3) was incorporated in the Agency's original guidelines for implementation

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within 15 days after notice to the petitioner. If the recommendation of the director is for the granting of a variance, the department may do so without a hearing: Provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the department a written request for such notification."

[7] The pertinent text of § 110 (a)(3) appears *infra*, at 75.

plans, 40 CFR §§ 51.6 (c), 51.32 (f) (1973).[8] Although a spokesman for respondent NRDC had earlier stated that the Agency's guideline in this regard "correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of the plan," [9] that organization later developed second thoughts on the matter. Its present position, in which it is joined by another environmental organization and by two individual respondents who reside in affected air quality control regions within the State of Georgia, is that variances applicable to individual sources may be approved only if they meet the stringent procedural and substantive standards of § 110 (f).[10] This section permits one-year "postponements" of any requirement of a plan, subject to conditions which will be discussed below.

The Court of Appeals agreed with respondents, and ordered the Agency to disapprove Georgia's variance provision, although it did not specify which of the § 110 (a)(2) requirements were thereby violated.[11] It held

[8] Title 40 CFR § 51.32 (f) (1973) reads as follows:

"A State's determination to defer the applicability or any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6."

[9] Hearings, on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I), before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., 2d Sess., 45 n. 51 (statement of Richard E. Ayres).

[10] The text of § 110 (f) appears *infra,* at 75–76, and n. 14.

[11] Other Circuits which have ordered the disapproval of implementation plan variance procedures have likewise failed to identify the offended requirement, even though § 110 (a)(2) quite clearly mandates approval of any plan which satisfies its minimum conditions. See n. 2, *supra.* Since petitioners have not raised the point in this Court, we have no occasion to consider it.

that while the revision authority of § 110 (a)(3) was available for *generally* applicable changes of an implementation plan, the postponement provision of § 110 (f) was the only method by which *individual* sources could obtain relief from applicable emission limitations. In reaching this conclusion the court rejected petitioners' suggestion that whether a proposed variance should be treated as a "revision" under § 110 (a)(3), or as a "postponement" under § 110 (f), depended on whether it would affect attainment of a national ambient air standard, rather than on whether it applied to one source or to many.

Other Circuits have also been confronted with this issue, and while none has adopted the Agency's position, all have differed from the Fifth Circuit. The first case was *Natural Resources Defense Council* v. *EPA*, 478 F. 2d 875 (CA1 1973). For reasons to be discussed, *infra*, at 91–94, the First Circuit rejected the revision authority as a basis for a variance procedure. It nonetheless concluded that prior to the three-year date for mandatory attainment of primary standards, a State could grant variances to sources which could not immediately meet applicable emission limitations. The court reasoned:

> "We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply.
>
> "The Administrator sees his power to allow such exemption procedures as deriving from the 'revision' authority in § [110] (a)(3). We tend to view it more as a necessary adjunct to the statutory scheme, which anticipates greater flexibility during the pre-attainment period." 478 F. 2d, at 887.

The First Circuit's resolution, which has been described as "Solomonesque," is not tied to any specific provision of the Clean Air Act. Rather, it is quite candidly a judicial creation providing flexibility which, according to its creators, Congress may be inferred to have intended to provide. Two other Circuits subsequently followed the First Circuit. *Natural Resources Defense Council* v. *EPA*, 483 F. 2d 690, 693–694 (CA8 1973); *Natural Resources Defense Council* v. *EPA*, 494 F. 2d 519, 523 (CA2 1974). Neither expanded on the First Circuit's reasoning.

The Ninth Circuit has adopted a third approach to this question, in *Natural Resources Defense Council* v. *EPA*, 507 F. 2d 905, 911–917 (1974). After considering legislative history, the Ninth Circuit concluded that Congress did not intend the postponement mechanism to be the exclusive source for variances. But the court also did not adopt the Agency's view that variances could be authorized as § 110 (a)(3) revisions, although it did not explain its rejection of this interpretation. Rather, the Ninth Circuit agreed with the First Circuit that flexibility was "a necessary adjunct to the statutory scheme." It explained:

> "As long as a possible variance from a state plan will not preclude the attainment or maintenance of such standards, we discern no legislative intent to commit a state, in toto, to its initial plan, without any flexibility whatsoever." 507 F. 2d, at 913.

The Ninth Circuit, however, rejected the First Circuit's distinction between the preattainment and postattainment periods. It concluded that statutory support for flexibility was as strong after the attainment date as before, especially in light of the Act's encouragement of the States to adopt plans even stricter than those required

to attain national standards.[12] The court thus adopted an approach which differs from the Agency's, but which reaches the same result—authorization of variances on standards other than those required for § 110 (f) postponements, both *before and after* the attainment date, so long as the variance does not prevent timely attainment and subsequent maintenance of national ambient air standards.

After the Courts of Appeals for the First, Eighth, Fifth, and Second Circuits had spoken, but prior to the decision of the Ninth Circuit, the Agency modified its guidelines to comply with the then-unanimous rulings that after the attainment date the postponement provision was the only basis for obtaining a variance. 39 Fed. Reg. 34533–34535, adding 40 CFR §§ 51.11 (g), 51.15 (d) and revising § 51.32 (f). At the same time, the Agency formally disapproved variance provisions to the extent they authorized variances extending beyond attainment dates, unless the standards of § 110 (f) were met. 39 Fed. Reg. 34535, adding 40 CFR § 52.26.

Because the Agency has conformed its regulations to the decisions of the First, Eighth, and Second Circuits, this case on its facts is now limited to the validity of the Georgia variance provision insofar as it authorizes variances effective before Georgia's attainment date, which is in July 1975.[13] The Agency nonetheless has not abandoned its original view that the revision section authorizes variances which do not interfere with the attainment or maintenance of national ambient air standards. Moreover, the Agency is candid in admitting that should we

[12] See § 116 of the Clean Air Act, as amended, 84 Stat. 1689 and 88 Stat. 259, 42 U. S. C. § 1857d–1 (1970 ed., Supp. IV).

[13] The attainment dates for several air quality control regions within other Fifth Circuit States are as late as May 31, 1977, by virtue of two-year extensions granted pursuant to § 110 (e). See n. 20, *infra*.

base our decision on its interpretation of § 110 (a)(3), the decision would support the approval of implementation plans which provide for variances effective after the attainment date.

The disparity among the Courts of Appeals rather strongly indicates that the question does not admit of an easy answer. Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts.

III

Both of the sections in controversy are contained in § 110 of the amended Clean Air Act, which is entitled "Implementation Plans." Section 110 (a)(3) provides in pertinent part:

> "(A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirement of paragraph (2) and has been adopted by the State after reasonable notice and public hearings."

Section 110 (f) provides:

> "(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—
>
> "(A) good faith efforts have been made to comply with such requirement before such date,
>
> "(B) such source (or class) is unable to comply

with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

"(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

"(D) the continued operation of such source is essential to national security or to the public health or welfare,

"then the Administrator shall grant a postponement of such requirement." [14]

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[14] Section 110 (f)(2) specifies the procedural requirements for postponement. It reads as follows:

"(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

"(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

"(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and

As previously noted, respondents contend that "variances" applicable to individual sources—for example, a particular factory—may be approved only if they meet the stringent procedural and substantive standards set forth in § 110 (f). As is apparent from the text of § 110 (f), its postponements may be for no more than one year, may be granted only if application is made prior to the date of required compliance, and must be supported by the Agency's determination that the source's continued operation "is essential to national security or to the public health or welfare." Petitioners, on the other hand, rely on the revision authority of § 110 (a)(3) for the contention that a state plan may provide for an individual variance from generally applicable emission limitations so long as the variance does not cause the plan to fail to comply with the requirements of § 110 (a)(2). Since a variance would normally implicate only the § 110 (a)(2)(A) requirement that plans provide for attainment and maintenance of national ambient air standards, treatment as revisions would result in variances being readily approved in two situations: first, where the variance does not defer compliance beyond the attainment date; [15] and second, where the national standards have been attained and the variance is not so great that a plan incorporating it could not insure their continued maintenance. Moreover, a § 110 (a)(3) revision may be granted on the basis of hearings conducted by the State, whereas a § 110 (f)

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shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

"(D) Section 307 (a) of this title (relating to subpoenas) shall be applicable to any proceeding under this subsection."

[15] We recognize that attainment of the standards is required as soon as "practicable," and that a preattainment variance could not be granted under the revision authority if immediate compliance by a particular source were "practicable" and such compliance would expedite attainment. See *infra*, at 96–97, and n. 30.

postponement is available only after the Agency itself conducts hearings.

There is thus considerable practical importance attached to the issue of whether variances are to be treated as revisions or as postponements, or for that matter, as the First Circuit would have it, as neither until the mandatory attainment date but as postponements thereafter. This practical importance reaches not merely the operator of a particular source who believes that circumstances justify his receiving a variance from categorical limitations. It also reaches the broader issue of whether Congress intended the States to retain any significant degree of control of the manner in which they attain and maintain national standards, at least once their initial plans have been approved or, under the First Circuit's approach, once the mandatory attainment date has arrived. To explain our conclusion as to Congress' intent, it is necessary that we consider the revision and postponement sections in the context of other provisions of the amended Clean Air Act, particularly those which distinguish between national ambient air standards and emission limitations.

As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which § 110 (a) (2)(A) requires that state plans provide. In complying with this requirement a State's plan must include "emission limitations," which are regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards.

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met.[16] Under § 110 (a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110 (c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

This analysis of the Act's division of responsibilities is not challenged by respondents insofar as it concerns the process of devising and promulgating an initial imple-

[16] Exceptions are the Agency's authority to set emission limitations for new motor vehicles, § 202 *et seq.* of the Clean Air Act, as amended, 84 Stat. 1690–1698 and 88 Stat. 258, 42 U. S. C. § 1857f–1 *et seq.* (1970 ed., Supp. IV); to set emission limitations for aircraft, § 231 *et seq.* of the Clean Air Act, as added, 84 Stat. 1703–1705, 42 U. S. C. § 1857f–9 *et seq.;* to set emission limitations for categories of new stationary sources, § 111 of the Clean Air Act, as added, 84 Stat. 1683, and amended, 85 Stat. 464, 42 U. S. C. § 1857c–6 (1970 ed. and Supp. I); and to regulate the sale of fuels and fuel additives, § 211 of the Clean Air Act, as amended, 84 Stat. 1698 and 85 Stat. 464, 42 U. S. C. § 1857f–6c (1970 ed. and Supp. I).

mentation plan. Respondents do, however, deny that the States have such latitude once the initial plan is approved. Yet the third paragraph of § 110 (a), and the one immediately following the paragraphs which specify that States shall file implementation plans and that the Agency shall approve them if they satisfy certain broad criteria, is the section which *requires* the Agency to "approve any revision of an implementation plan" if it "determines that it meets the requirements" of § 110 (a)(2). On its face, this provision applies to *any* revision, without regard either to its breadth of applicability, or to whether it is to be effective before or after the attainment date; rather, Agency approval is subject only to the condition that the revised plan satisfy the general requirements applicable to original implementation plans. Far from evincing congressional intent that the Agency assume control of a State's emission limitations mix once its initial plan is approved, the revision section is to all appearances the mechanism by which the States may obtain approval of their developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level which is consistent with the national ambient air standards.

In order to challenge this characterization of § 110 (a)(3), respondents principally rely on the contention that the postponement provision, § 110 (f), is the only mechanism by which exceptions to a plan's requirements may be obtained, under any circumstances. Were this an accurate description of § 110 (f), we would agree that the revision authority does not have the broad application asserted by the Agency. Like the Ninth Circuit,[17] however, we believe that § 110 (f) serves a function different from that of supervising state efforts to modify the initial

[17] *Natural Resources Defense Council* v. *EPA*, 507 F. 2d 905, 911–913 (1974).

mix of emission limitations by which they implement national standards.

In our view, § 110 (f) is a safety valve by which may be accorded, under certain carefully specified circumstances, exceptions to the national standards themselves. That this is its role is strongly suggested by the process by which it became a part of the Clean Air Act. The House version of the Amendment, H. R. 17255, 91st Cong., 2d Sess., contained no provisions for either postponements or, most significantly, mandatory deadlines for the attainment of national ambient air standards. The Senate bill, S. 4358, 91st Cong., 2d Sess., did contain both the three-year deadline, which now appears in § 110 (a)(2), and the predecessor of the present § 110 (f). That predecessor [18] permitted the governor of a

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[18] Section 111 (f) of the Clean Air Act, as would have been added by S. 4358, 91st Cong., 2d Sess., read as follows:

"(1) No later than one year before the expiration of the period for the attainment of ambient air of the quality established for any national ambient air quality standard promulgated pursuant to section 110 of this Act, the Governor of a State in which is located all or part of an air quality control region designated or established pursuant to this Act may file a petition in the district court of the United States for the district in which all or a part of such air quality control region is located against the United States for relief from the effect of such expiration (A) on such region or portion thereof, or (B) on a person or persons in such air quality control region. In the event that such region is an interstate air quality control region or portion thereof, any Governor of any State which is wholly or partially included in such interstate region shall be permitted to intervene for the presentation of evidence and argument on the question of such relief.

"(2) Any action brought pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and appeal shall be to the Supreme Court. Proceedings before the three judge court, as authorized by this subsection, shall take precedence on the docket over all other causes of action and shall be assigned

State to petition a three-judge district court for "relief from the effect" of expiration of the three-year deadline as to a region or persons, and provided for the grant of such relief upon a showing of conditions similar to those

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for hearing and decision at the earliest practicable date and expedited in every way.

"(3)(A) In any such proceeding the Secretary shall intervene for the purpose of presenting evidence and argument on the question of whether relief should be granted.

"(B) The court, in its discretion, may permit any interested person residing in any affected State to intervene for the presentation of evidence and argument on the question of relief.

"(4) The court, in view of the paramount interest of the United States in achieving ambient air quality necessary to protect the health of persons shall grant relief only if it determines such relief is essential to the public interest and the general welfare of the persons in such region, after finding—

"(A) that substantial efforts have been made to protect the health of persons in such region; and

"(B) that means to control emissions causing or contributing to such failure are not available or have not been available for a sufficient period to achieve compliance prior to the expiration of the period to attain an applicable standard; or

"(C) that the failure to achieve such ambient air quality standard is caused by emissions from a Federal facility for which the President has granted an exemption pursuant to section 118 of this Act.

"(5) The court, in granting such relief shall not extend the period established by this Act for more than one year and may grant renewals for additional one year periods only after the filing of a new petition with the court.

"(6) The Secretary, in consultation with any affected State or States, shall take such action as may be necessary to modify any implementation plan or formulate any new implementation plan for the period of such extension.

"(7) No extension granted pursuant to this section shall effect compliance with any emission requirement, timetable, schedule of compliance, or other element of any implementation plan unless such requirement, timetable, schedule of compliance, or other element of such plan is the subject of the specific order extending the time for compliance with such national ambient air quality standard."

now appearing in § 110 (f). Under its language the postponement provision plainly applied only when deferral of a national deadline was sought.[19]

The Conference Committee adopted the Senate's general approach to the deadline issue. Its report states:

> "*The conference substitute follows the Senate amendment in establishing deadlines for implementing primary ambient air quality standards* but leaves the States free to establish a reasonable time period within which secondary ambient air quality standards will be implemented. *The conference substitute modifies the Senate amendment in that it allows the Administrator to grant extensions for good causes shown upon application by the Governors.*" H. R. Conf. Rep. No. 91–1783, p. 45 (1970). (Emphasis added.)

Nowhere does the report suggest that other changes in the Senate's proposed § 111 (f) were intended to dramatically broaden its reach, such that it would not merely be available to obtain deferral of the strict deadlines for compliance with national standards, but would also be the exclusive mechanism for any ameliorative modification of a plan, no matter how minor.

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[19] This fact, as well as the "safety valve" nature of the Senate's predecessor to the postponement provision, is also apparent from the Senate report:

"Finally, the Committee would recognize that compliance with the national ambient air quality standards deadline may not be possible. If a Governor judges that any region or regions or portions thereof within his State will not meet the national ambient air quality standard within the time provided, [§ 111 (f) of] the bill would authorize him—one year before the deadline—to file a petition against the United States in the District Court of the United States for the district where such region or portion thereof is located for relief from the effect of such expiration." S. Rep. No. 91–1196, pp. 14–15 (1970).

That the postponement provision was intended merely as a method of escape from the mandatory deadlines becomes even clearer when one considers the summary of the conference's work which Senator Muskie presented to the Senate. The summary referred to a provision under which a single two-year extension of the deadline could be obtained were it shown to be necessary at the time a State's initial plan was submitted. It then immediately discussed the postponement provision, as follows:

> "A Governor may also apply for a postponement of *the deadline* if, when *the deadline* approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control measures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State." 116 Cong. Rec. 42384–42385. (Emphasis added.)

This limited view of the role of § 110 (f) is reinforced by comparison with the section which immediately precedes it in the statute, § 110 (e).[20] This is the provision

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[20] Section 110 (e), 42 U. S. C. § 1857c–5 (e), reads as follows:

"(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

"(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

"(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary

to which Senator Muskie's summary was obviously referring when it stated that the three-year deadline could be extended for up to two years if proper application were made at the time a State first submitted its plan. Like § 110 (f), § 110 (e) is available only if an emission source is unable to comply with plan requirements because "the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance." Section 110 (e) also contains a requirement parallel to that of § 110 (f)(1)(C), that available alternative procedures and control measures have been considered and utilized. Unlike § 110 (f), however, § 110 (e) contains no requirement that "the continued operation of such source is essential to national security or to the public health or welfare." Section 110 (e) thus permits a two-year extension on a showing considerably less stringent than that required for a § 110 (f) one-year postponement. This disparity is quite logical, however, because the relief under § 110 (e) is limited to an initial two-year period, whereas that under § 110 (f) is available at any time, so long as application is made prior to the effective date of the relevant requirement.[21]

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standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

"(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

"(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

"(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances."

[21] The language of § 110 (f) would also seem to support any number of successive one-year postponements, so long as application is timely. There is potentially some dispute as to this, however, because the Conference Committee deleted, without comment, language

On the other hand, the disparity between the standards of § 110 (e) and those of § 110 (f) would be inexplicable were § 110 (f) also the sole mechanism by which States could modify the particular emission limitations mix incorporated in their initial implementation plans, even though the desired modifications would have no impact on the attainment or maintenance of national standards. Respondents' interpretation requires the anomalous conclusion that Congress, having stated its goal to be the attainment and maintenance of specified ambient air standards, nonetheless made it significantly more difficult for a State to modify an emission limitations mix which met those standards both before and after modification than for a State to obtain a two-year deferral in the attainment of the standards themselves. The interpretation suffers, therefore, not only from its contrariety to the revision authority which Congress provided, but also from its willingness to ascribe inconsistency to a carefully considered congressional enactment.

We believe that the foregoing analysis of the structure and legislative history of the Clean Air Amendments shows that Congress intended to impose national ambient air standards to be attained within a specific period of time. It also shows that in §§ 110 (e) and (f) Congress carefully limited the circumstances in which timely attainment and subsequent maintenance of these standards could be compromised. We also believe that Congress, consistent with its declaration that "[e]ach State

in the Senate predecessor to § 110 (f) that explicitly permitted successive postponements. See proposed § 111 (f)(5) of the Clean Air Act, as would have been added by S. 4358, 91st Cong., 2d Sess., n. 18, *supra*. This question is not presented by this case, and we do not decide it. We simply note the possibility of successive postponements as an additional element which would reasonably explain the imposition of harsher standards in § 110 (f) than in § 110 (e).

shall have the primary responsibility for assuring air quality" within its boundaries, § 107 (a), left to the States considerable latitude in determining specifically how the standards would be met. This discretion includes the continuing authority to revise choices about the mix of emission limitations. We therefore conclude that the Agency's interpretation of §§ 110 (a)(3) and 110 (f) was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency. *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *McLaren* v. *Fleischer*, 256 U. S. 477, 480–481 (1921). We are not persuaded to the contrary by any of the arguments advanced by respondents or by the Courts of Appeals which have rejected § 110 (a)(3) as authority for granting variances. To these various arguments we now turn.

IV

The principal basis on which the Fifth Circuit rejected the Agency's view of the revision and postponement sections was its analysis of their language. The court focused first on the fact that § 110 (f) speaks in terms of "*any* stationary source," and of the postponement of "*any* requirement of an applicable implementation plan." (Emphasis added.) This language, according to the Fifth Circuit, belies the Agency's contention that the postponement section is inapplicable to those variances which do not jeopardize the attainment or maintenance

of national standards. The court went on to state, without citation or supporting reasoning:

> "A revision is a change in a generally applicable requirement; a postponement or variance [is a] change in the application of a requirement to a particular party. The distinction between the two is familiar and clear." 489 F. 2d 390, 401.

We think that the Fifth Circuit has read more into § 110 (f), and more out of § 110 (a)(3), than careful analysis can sustain. In the first place, the "any stationary source" and "any requirement" language of § 110 (f) serves only to define the matters with respect to which the governor of a State *may* apply for a postponement. The language does not, as the Fifth Circuit would have it, state that all sources desirous of any form of relief *must* rely solely on the postponement provision. While § 110 (f) makes its relief available to any source which can qualify for it, regardless of whether the relief would jeopardize national standards, the section does not even suggest that other forms of relief, having no impact on the national goal of achieving air quality standards, are not also available on appropriately less rigorous showings.

As for the Fifth Circuit's observation that "a revision is a change in a generally applicable requirement," whereas a "postponement or variance" deals with particular parties, we are not satisfied that the distinction is so "familiar and clear." While a variance is generally thought to be of specific applicability,[22] whether a revision

[22] We note, however, that there may be substantial difficulties in determining whether a proposed modification is of general or specific application. Requirements written in general terms may in fact be of very specific impact, as a result of the limited number of similar sources, or even of conscious efforts to evade restrictions on "specific" changes. For example, the regulation at issue in *Getty*

is general or specific depends on what is being revised. In this instance, it is implementation plans which are being revised, and it is clear that such plans may be quite detailed, both as to sources and the remedial steps required of the sources. Not only does § 110 (a)(2)(B) specify that a plan shall include "emission limitations, schedules, and timetables for compliance," [23] but respondents themselves have urged that the very specific variances which have already been granted in Georgia should have been, and may still be, treated as "compliance schedules" contained within the original plan.[24]

A further difficulty with the Fifth Circuit's analysis of the language of §§ 110 (a)(3) and 110 (f) is that it entirely overlooks an obvious distinction between revisions and postponements. In normal usage, to "postpone" is to defer, whereas to "revise" is to remake or amend. In the implementation plan context, normal usage would suggest that a postponement is a deferral of the effective date of a requirement which remains a part of the applicable plan, whereas a revision is a change in the plan itself which deletes or modifies the requirement. If by revision a requirement of a plan is *removed*, then a person seeking relief from that requirement has no

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Oil Co. v. *Ruckelshaus*, 467 F. 2d 349 (CA3 1972), spoke of all fuel-burning equipment having a maximum rate of heat input equal to or greater than 500 million Btu per hour, and located in New Castle County, Del., south of U. S. Route 40. There was only one such installation.

[23] The Florida plan, for example, presently contains compliance schedules which specify not merely particular business operations, but also the principal emission sources within particular operations. See 40 CFR § 52.524 (c) (1974).

[24] Brief for Respondents 48–49. Respondents do not, however, suggest any statutory basis for incorporating compliance schedules into a plan once it has been approved. We know of none save the revision authority which respondents would have us declare unavailable for modifications of a specific nature.

need to seek its *postponement*, and § 110 (f) is by its terms inapplicable. But if such a person cannot obtain a revision, because for example the plan as so revised would no longer insure timely attainment of the national standards, then under the Act he has no alternative but to comply or to obtain a postponement of the requirement's effective date—if he can satisfy the stringent conditions of § 110 (f). This distinction between the two is so straightforward, and so consistent with the structure and history of the Act, as discussed in Part III of this opinion, that we perceive no basis for the Fifth Circuit's strained line of analysis.[25]

The Fifth Circuit also relied on the "technology forcing" nature of the Clean Air Amendments of 1970. It reasoned that because the statute was intended to force technology to meet specified, scheduled standards,

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[25] Much of the confusion which has afflicted the Fifth Circuit and the other Courts of Appeals probably has been generated by the States' practice of referring to exceptions from categorical limitations as "variances" rather than as "revised compliance schedules," and also by the fact that in practice a "variance" typically has the effect of deferring the date on which compliance with categorical limitations is required. Our concern, however, is not with the nomenclature assigned to exceptions, but rather with whether they are of a nature that may be authorized as § 110 (a)(3) revisions. That an exception which does not jeopardize national standards may in effect be a deferral does not change the facts (1) that it revises a plan from one which requires a source to comply by, say, July 1972, to one which requires its compliance as of, say, May 1975, and (2) that the plan as so revised still possesses all of the characteristics which it must under § 110 (a)(2). An exception which *does* jeopardize national standards, on the other hand, cannot be a revision because it would deprive the revised plan of a characteristic without which it cannot under the Act be an applicable plan. See § 110 (d) which defines "applicable implementation plan" as the "implementation plan, or most recent revision thereof, which has been approved under [§ 110 (a)(2)] . . . ." Such an exception must be obtained, if at all, as a postponement of the requirements of the applicable plan.

it was essential to insure that commitments made at the planning stage could not be readily abandoned when the time for compliance arrived. According to the Fifth Circuit, § 110 (f) "is the device Congress chose to assure this." 489 F. 2d, at 401. Clearly § 110 (f) does present a formidable hurdle for those proposed departures from earlier commitments which are in fact subject to its stringent conditions. What the Fifth Circuit failed to consider, however, is that so long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments. Agency review assures that variances granted under § 110 (a)(3) will be consistent with the § 110 (a)(2)(A) requirement that the national standards be attained as expeditiously as practicable and maintained thereafter. Thus § 110 (a)(3) variances *ex hypothesi* do not jeopardize national standards, and the technology-forcing character of the Amendments is no reason at all for judging them under the provisions of § 110 (f).

The First Circuit also rejected the Agency's contention that variances could be handled under the revision procedure, *supra,* at 72–73, but it did so for reasons different from those relied upon by the Fifth Circuit.[26] It stated:

> "Had Congress meant [§ 110 (f)] to be followed only if a polluter, besides violating objective state

[26] The First Circuit's decision was strongly criticized in Comment, Variance Procedures under the Clean Air Act: The Need for Flexibility, 15 Wm. & Mary L. Rev. 324 (1973). The Comment was especially concerned with the conclusion that § 110 (f) was the exclusive postattainment variance mechanism, focusing on this conclusion's lack of support in the statute and legislative history, on its inconsistency with other provisions of the statute, and on its untoward results. A second commentator, writing prior to any of the Court of Appeals decisions, reached conclusions similar to those we today express. Luneburg, Federal-State Interaction under the Clean Air

> requirements, was shown to be preventing maintenance of a national standard, it would have said so. To allow a polluter to raise and perhaps litigate that issue is to invite protracted delay. The factual question could have endless refinements: is it the individual variance-seeker or others whose pollution is preventing maintenance of standards? *See e. g.*, Getty Oil Company v. Ruckelshaus, 342 F. Supp. 1006 (D. Del. 1972), remanded with directions, 467 F. 2d 349 (3rd Cir. 1972), . . . where *Getty* raised this issue in various forums." 478 F. 2d, at 886.

Respondents also stress this argument: treating variances as revisions rather than as postponements would invite litigation, would be impractical in application, and would therefore result in degradation of the environment. Aside from the fact that it goes more to the wisdom of what Congress has chosen to do than to determining what Congress has done, we believe this argument to be overstated. As made clear in the *Getty* case cited by the First Circuit, a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency. Should either entity determine that granting the variance would prevent attainment or maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures.[27]

Amendments of 1970, 14 B. C. Ind. & Com. L. Rev. 637 (1973). (At the time he wrote this article, Mr. Luneburg was an attorney in the Enforcement Division, Environmental Protection Agency, Region I.)

[27] Emission limitations contained in an implementation plan may

We are further impressed that the Agency itself has displayed no concern for the purported administrative difficulty of treating variances as revisions. Ordinarily, an agency may be assumed capable of meeting the responsibilities which it contends are placed upon it. Were respondents able to make a contrary showing, that fact might have some weight in interpreting Congress' intent, although we would doubt its relevance unless Congress were also shown to have been aware of the problem when it drafted legislation which otherwise is consistent with the Agency's contentions. Respondents have made no such showings. The judgments which the Agency must make when passing on variances under § 110 (a)(3) are whether the ambient air complies with national standards, and if so whether a proposed variance would cause a plan to fail to insure maintenance of those standards. These judgments are little different from those which the Agency had to make when it approved the initial plans into which respondents seek to have the States frozen. In each instance the Agency must measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of specified emission modifications.[28] That Congress is of the opinion

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be enforced in several ways. Aside from whatever state procedures are available under the plan, § 113 of the Clean Air Act, as added, 84 Stat. 1686, and amended, 88 Stat. 259, 42 U. S. C. § 1857c–8 (1970 ed., Supp. IV), imposes a duty of enforcement on the Agency. The Agency may issue compliance orders (the violation of which carries severe monetary penalties), or it may bring civil actions for injunctive relief. In addition, § 304 of the Clean Air Act, as added, 84 Stat. 1706, 42 U. S. C. § 1857h–2, provides for citizen suits against any person alleged to be in violation of an emission limitation, and against the Administrator where he is alleged to have failed to perform a nondiscretionary act. Plaintiffs in such actions may be awarded attorneys' fees. § 304 (d).

[28] We recognize that numerous applications for changes of a specific nature have a potential for creating a different kind of problem from

that the Agency can feasibly and reliably perform these functions is manifest not only in its 1970 legislation, but also in a 1974 amendment designed to conserve energy. The amendment provides that the Agency should report to each State on whether its implementation plan could be revised in relation to fuel burning stationary sources, "*without interfering with the attainment and maintenance of any national ambient air quality standard.*" § 110 (a)(3)(B) of the Clean Air Act, as added, 88 Stat. 256, 42 U. S. C. § 1857c–5 (a)(3)(B) (1970 ed., Supp. IV). (Emphasis added.)

V

Respondents have put forward several additional arguments which have not been specifically adopted by any court of appeals. The first is based on legislative history. Respondents focus on the fact that while the Conference Committee accepted the Senate's concept of a three-year maximum deadline for attainment of national standards,

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that posed by the formulation of general regulations. Such a problem would arise when the grant of a variance to one source would not affect national standards, but the simultaneous or subsequent grant of similar variances to similar sources could result in the plan's failure to insure the attainment and maintenance of the standards. As we have noted in the text, however, the Agency charged with the administration of the Act, and made ultimately responsible for the attainment and maintenance of the national standards, does not view this problem as anywhere near insurmountable. Variances under § 110 (a)(3) cannot be granted until first the State, and then the Agency, have determined that they will not jeopardize the standards. We cannot and do not attempt to foresee, at this stage in the administration of the statute, all of the questions, to say nothing of the answers, that may arise in the allocation of a limited number of available variances. The fact that the interpretation placed on the section by the Agency may on occasion require administrative flexibility and ingenuity to a greater degree than would a more rigid alternative is not, of course, a reason for rejecting the Agency's otherwise reasonable construction.

it also strengthened the Senate's provision by specifying that attainment should be achieved *"as expeditiously as practicable* but . . . in no case later than three years." (Emphasis added.) Respondents further make the contention that the Conference Committee altered the Senate's version of the postponement provision to "provide that a source's attempt to delay compliance with *'any* requirement' of a State Plan would be considered a 'postponement.'" Brief for Respondents 36. According to respondents the latter change "was necessary to conform" the postponement provision with the Conference Committee's "as expeditiously as practicable" requirement.[29]

[29] Compare the language of § 110 (f), *supra*, at 75–76, and n. 14, with that of the Senate's proposed § 111 (f), n. 18, *supra*. In light of our textual comments concerning respondents' interpretation of the Conference Committee's changes, we think that a considerably simpler and more satisfactory explanation is available. The most substantial difference between the two, other than the forum for decision, would have been that § 110 (f) is triggered by an application filed prior to the date of compliance with any requirement of a plan, whereas § 111 (f) is triggered by a filing at least a year prior to the deadline for attainment. The Conference Committee's change can be quite reasonably viewed as a recognition that the extreme circumstances justifying breach of the national standards could be present with respect to a requirement taking effect either before or after the attainment date. That might occur, for example, if technological difficulties should prevent required preattainment construction of necessary abatement equipment, or if increasing population density should eventually cause more stringent limitations to be necessary to maintain the national standards. Once it is determined that postponements should be available with regard to any requirement of a plan, and not merely to those tied directly to the attainment date, then the change from "region" and "person or persons" to "any stationary source or class of moving sources" follows rather naturally. The latter phrase is far more convenient for use in conjunction with "any requirement of an applicable implementation plan," yet is not significantly more or less inclusive than the former (while the final version requires source-by-source postponements, and does not provide for relief with respect to

The argument is that because any variance would delay attainment of national standards beyond the date previously considered the earliest practicable, and that because the Act requires attainment as soon as practicable, any variance must therefore be treated as a postponement. This argument is not persuasive, for multiple reasons.

First, this interpretation of the Conference Committee's work finds no specific support in legislative documents or debates. This is true despite the significance of the change which, under respondents' interpretation, was made—the expansion of § 110 (f) from a safety valve against mandatory deadlines into the exclusive mechanism by which a State could make even minor modifications of its emission limitations mix. Respondents' interpretation arises instead from their own reading of the statute and inferences as to legislative purpose. Second, as we have already discussed, and contrary to respondents' contention, § 110 (f) simply does not state that any deferral of compliance with "any requirement" of a state plan "would be considered a postponement." Rather, it merely states that a postponement *may* be sought with respect to any source and any requirement.

Third, respondents' reading equates "practicable" in § 110 (a)(2)(A) with § 110 (f)'s "essential to national security or to the public health or welfare." Yet plainly there could be many circumstances in which attainment in less than three years would be impracticable, and thus not required, but in which deferral could not possibly be justified as essential to the national security, or public

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an entire region, that requirement was in any event implicit in proposed § 111 (f)(4)'s conditions for granting relief; and while "class of moving sources" is less inclusive than "person or persons," the restriction is not only sensible in light of the small emissions from any single moving source, but it also has no discernible relevance to our inquiry).

health or welfare.[30] Fourth, the statute requires only attainment as expeditiously as practicable, not attainment as expeditiously as was *thought* practicable when the initial implementation plan was devised. Finally, even if respondents' argument had force with regard to a preattainment variance, it would still be of no relevance whatsoever once the national standards were attained. A variance which does not compromise national standards that have been attained does no damage to the congressional goals of attaining the standards as expeditiously as practicable and maintaining them thereafter.

The last of respondents' arguments which merit our attention is related to the Fifth Circuit's conclusion that revisions are restricted to general requirements, and that all specific modifications must therefore be funneled through the postponement provision. Respondents go one step further and contend that the revision authority is limited not only to general changes, but to those which also are initiated by the Agency in order to "accelerate abatement or attain it in greater concert with other national goals." Brief for Respondents 26. This highly restrictive view of § 110 (a)(3) is based on § 110 (a)(2)(H),[31] which specifies that to obtain Agency approval

[30] Whether the Georgia variance provision meets the practicability standard with regard to preattainment variances is a different issue. It authorizes variances on the basis of conditions beyond the control of the persons involved, on the basis of circumstances which would render strict compliance "unreasonable, unduly burdensome, or impractical," on the basis of findings that strict compliance would result in substantial curtailment or closing down of business operations, and because alternatives are not yet available. See n. 6, *supra*. Respondents, however, did not attack the Georgia variance procedure on this more limited ground, and we need not consider the issue.

[31] See n. 2, *supra*.

a State's plan must provide a mechanism for revision to take account of revised national standards, of more expeditious methods of achieving the standards, and of Agency determinations that a plan is substantially inadequate.

The argument is specious. Section 110 (a)(2)(H) does nothing more than impose a minimum requirement that state plans be capable of such modifications as are necessary to meet the basic goal of cleansing the ambient air to the extent necessary to protect public health, as expeditiously as practicable within a three-year period. The section in no way prevents the States from also permitting ameliorative revisions which do not compromise the basic goal. Nor does it, by requiring a particular type of revision, preclude those of a different type. As we have already noted, § 110 (a)(3) requires the Agency to approve "any revision" which is consistent with § 110 (a)(2)'s minimum standards for an initial plan, and which the State adopted after reasonable public notice and hearing; no other restrictions whatsoever are placed on the Agency's duty to approve revisions.[32]

VI

For the foregoing reasons, the Court of Appeals for the Fifth Circuit was in error when it concluded that the postponement provision of § 110 (f) is the sole method by which may be obtained specific ameliorative modifica-

[32] Respondents also claim that their view of revisions is supported by the context in which the term is used in other parts of the amended Act. We disagree. Two instances, §§ 110 (a)(2)(A)(i) and 110 (c)(1)(C), are references to the revision mechanism required by § 110 (a)(2)(H), but do not suggest that there may not also be other types of revisions. The other two, §§ 110 (a)(1) and 110 (d), are entirely neutral both in terms of whether revisions are specific or general and in terms of whether they may occur independently of § 110 (a)(2)(H).

tions of state implementation plans. The Agency had properly concluded that the revision mechanism of § 110 (a)(3) is available for the approval of those variances which do not compromise the basic statutory mandate that, with carefully circumscribed exceptions, the national primary ambient air standards be attained in not more than three years, and maintained thereafter. To the extent that the judgment of the Court of Appeals for the Fifth Circuit was to the contrary, it is reversed and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

COLONIAL PIPELINE CO. *v.* TRAIGLE, COLLECTOR OF REVENUE OF LOUISIANA

APPEAL FROM THE SUPREME COURT OF LOUISIANA

No. 73–1595. Argued January 13, 1975—Decided April 28, 1975

Louisiana's fairly apportioned and nondiscriminatory corporation franchise tax upon the "incident" of the "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form" does not violate the Commerce Clause as applied to appellant, an interstate carrier of liquefied petroleum products incorporated in Delaware with its principal place of business in Atlanta, Georgia, which does no intrastate business in petroleum products in Louisiana but has employees there to inspect and maintain its pipeline, pumping stations, and related facilities in that State. "[T]he decisive issue turns on the operating incidence of the tax," *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441, and "[t]he simple but controlling question is whether the state has given anything for which it can ask return," *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Because appellant, as a foreign corporation qualified to carry on, and carrying on, its business in Louisiana in corporate form, gained benefits and protections from that State of value and importance to its business, it can be required through the franchise tax to pay its just share. *Memphis Gas Co.* v. *Stone*, 335 U. S. 80. Pp. 108–114.

289 So. 2d 93, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which REHNQUIST, J., joined, *post*, p. 114. STEWART, J., filed a dissenting opinion, *post*, p. 116. DOUGLAS, J., took no part in the consideration or decision of the case.

R. Gordon Kean, Jr., argued the cause for appellant. With him on the briefs was *John V. Parker*.

Whit M. Cook II argued the cause for appellee *pro hac vice*. With him on the brief was *Chapman L. Sanford*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We have once again a case that presents "the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities" related to a corporation's operation of an interstate business. *Memphis Gas Co.* v. *Stone*, 335 U. S. 80, 85 (1948).[1] The issue is whether Louisiana, consistent with the Commerce Clause, Art. I, § 8, cl. 3, may impose a fairly apportioned and nondiscriminatory corporation franchise tax on appellant, Colonial Pipeline Co., a corporation engaged exclusively in interstate business, upon the "incident" of its "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form." No question is raised as to the reasonableness of the apportionment of appellant's capital deemed to have been employed in Louisiana, and it is not claimed that the tax is discriminatory. The Supreme Court of Louisiana sustained the validity of the tax. 289 So. 2d 93 (1974). We noted probable jurisdiction, 417 U. S. 966 (1974). We affirm.

I

Appellant is a Delaware corporation with its principal place of business in Atlanta, Ga. It is a common carrier of liquefied petroleum products and owns and operates a pipeline system extending from Houston, Tex., to the New York City area. This 3,400-mile pipeline links the oil refining complexes of Texas and Louisiana with the population centers of the Southeast and

[1] "This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. . . . [T]he decisions have been 'not always clear . . . consistent or reconcilable.'" *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450, 457–458 (1959).

Northeast. Appellant daily delivers more than one million gallons of petroleum products to 14 States and the District of Columbia. Approximately 258 miles of the pipeline are located in Louisiana. Over this distance within Louisiana, appellant owns and operates several pumping stations which keep the petroleum products flowing at a sustained rate, and various tank storage facilities used to inject or withdraw petroleum products into or from the line. A work force of 25 to 30 employees—mechanics, electricians, and other workers—inspect and maintain the line within the State. During the tax years in question, 1970 and 1971, appellant maintained no administrative offices or personnel in Louisiana, although it had once maintained a division office in Baton Rouge. Appellant does no intrastate business in petroleum products in Louisiana.

On May 9, 1962, appellant voluntarily qualified to do business in Louisiana, although it could have carried on its interstate business without doing so. La. Rev. Stat. Ann. § 12:302 H (1969); see n. 8, *infra*. Thereupon, the Collector of Revenue imposed the Louisiana franchise tax on appellant's activities in the State during 1962. At that time La. Rev. Stat. Ann. § 47:601, the Louisiana Franchise Tax Act, expressly provided: "The tax levied herein is due and payable for *the privilege of carrying on or doing business,* the exercising of its charter or the continuance of its charter within this state, or owning or using any part or all of its capital or plant in this state." [2] (Emphasis supplied.)

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[2] Louisiana Rev. Stat. Ann. § 47:601 provided in 1963:

"Every domestic corporation and every foreign corporation, exercising its charter, authorized to do or doing business in this state, or owning or using any part or all of its capital or plant in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter, shall pay a tax at the rate

Appellant paid the tax and sued for a refund. The Louisiana Court of Appeal, First Circuit, held that, in that form, § 601 was unconstitutional as applied to appellant because, being imposed directly upon "the privilege of carrying on or doing [interstate] business," it violated the Commerce Clause, Art. I, § 8, cl. 3. *Colonial Pipeline Co.* v. *Mouton*, 228 So. 2d 718 (1969). The Supreme Court of Louisiana refused review. 255 La. 474, 231 So. 2d 393 (1970).[3]

Following this decision, the Louisiana Legislature amended La. Rev. Stat. Ann. § 47:601 by Act 325 of 1970. The amendment excised from § 601 the words: "The tax levied herein is due and payable for the privilege of carrying on or doing business," and substituted: "The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form," as one of three "alternative incidents" upon which the tax might be imposed. The other two "incidents"—the exercise of the corporate charter in the State, and the employment there of its capital, plant, or other property—

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of one dollar and 50/100 ($1.50) for each one thousand dollars ($1,000.00), or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than ten dollars ($10.00) in any case. The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter within this state, or owning or using any part or all of its capital or plant in this state."

[3] Refusal of review was not tantamount to an affirmance. The Louisiana Supreme Court stated in its opinion in the instant case: "This Court's refusal in 1969 to grant writs upon application by the State in that earlier case, while normally persuasive, does not carry the same weight as a precedent as it would, had that case been decided by this Court after the granting of a writ. . . . This Court is not bound by its refusal of writs, to adopt law expressed in appellate court opinions." 289 So. 2d 93, 96 (1974).

were carried forward from the earlier version of the statute.[4] See n. 2, *supra*.

The Collector of Revenue then renewed his efforts to impose a tax on appellant, this time for doing business "in a corporate form" during 1970 and 1971. Again, appellant paid the tax and sued for a refund. The Louisiana District Court and the Court of Appeal, First Circuit, concluded that the 1970 amendment made no substan-

[4] Section 601 (Supp. 1975) provides in pertinent part:

"§ 601. Imposition of tax

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

"(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

"(2) The exercising of a corporation's charter or the continuance of its charter within this state.

"(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

"It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute."

tive change in § 601, which it construed as still imposing the tax directly upon the privilege of carrying on or doing an interstate business, and held that amended § 601 was therefore unconstitutional as applied to appellant. 275 So. 2d 834 (1973).

The Supreme Court of Louisiana reversed. The court recognized that "[t]he pertinent Constitutional question is whether, as applied to a corporation whose exclusive business carried on within the State is interstate, this statute violates the Commerce Clause of the United States Constitution." 289 So. 2d, at 97. But the court attached controlling significance to the omission from the amended statute of the "primary operating incident [of the former version], i. e., 'the privilege of carrying on or doing business,' " *id.*, at 96, and the substitution for that incident of doing business in the corporate form. The court held: "The thrust of the [amended] statute is to tax not the interstate business done in Louisiana by a foreign corporation, but the doing of business in Louisiana in a corporate form, including 'each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations . . . .' " *Id.*, at 97. Accordingly, the court concluded that amended § 601 applied the franchise tax to foreign corporations doing only an interstate business in Louisiana not as a tax upon "the general privilege of doing interstate business but simply [as a tax upon] the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this state, the corporation's privilege of exercising and continuing its corporate character in the State of Louisiana, and the corporation's use of its corporate form to do business in the State." *Id.*, at 100. Upon that premise, the court validated the levy as a

constitutional exaction for privileges enjoyed by corporations in Louisiana and for benefits furnished by the State to enterprises carrying on business, interstate or local, in the corporate form, whether as domestic or foreign corporations. The court reasoned:

> "The corporation, including the foreign corporation doing only interstate business in Louisiana, enjoys under our laws many privileges separate and apart from simply doing business, such for instance as the legal status to sue and be sued in the Courts of our State, continuity of business without interruption by death or dissolution, transfer of property interests by the disposition of shares of stock, advantages of business controlled and managed by corporate directors, and the general absence of individual liability, among others.
>
> . . . . .
>
> "The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing interstate business in the State, does not in our view detract from the fact that the local incident taxed is the *form of doing business* rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause.
>
> "The statute does not discriminate between foreign and local corporations, being applicable, as it is, to both. Nor do we believe that the State's exercise of its power by this taxing statute is out of proportion to Colonial's activities within the state and their consequent enjoyment of the opportunities and protection which the state has afforded them.
>
> "Furthermore we believe that the State has given

> something for which it can ask return. The return, tax levy in this case, is an exaction which the State of Louisiana requires as a recompense for its protection of lawful activities carried on in this state by Colonial, activities which are incidental to the powers and privileges possessed by it by the nature of its organization, here, . . . the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of their pipeline system throughout the 258 miles of its pipeline in the State of Louisiana." *Id.*, at 100–101.[5]

This Court is, of course, not bound by the state court's determination that the challenged tax is not a tax on interstate commerce. "The State may determine for

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[5] The taxes levied against appellant for 1970 were $80,835.02 including interest and for 1971 were $69,884.78 including interest. These amounts were fixed by applying the $1.50 rate to an allocated figure computed according to a general allocation formula provided in La. Rev. Stat. Ann. § 47:606 as follows:

"A. General allocation formula.

"For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

"(1) . . . .

"(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. . . ."

The State Supreme Court found that appellant was liable only for the minimum amount specified in amended § 601 for 1970 and reduced the tax for that year to $10. The levy for 1971 was sustained in the full amount, 289 So. 2d, at 101.

Appellant also pays ad valorem taxes to Louisiana and 10 of its parishes, as well as state income taxes. For the years 1970 and 1971, ad valorem taxes totaled $743,561.34 and income taxes totaled $196,621.

itself the operating incidence of its tax. But it is for this Court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce.'" *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 392 (1952). We therefore turn to the question whether the tax imposed upon appellant under amended § 601, as construed by the Louisiana Supreme Court, is or is not a tax on interstate commerce.

II

It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938). Accordingly, decisions of this Court, particularly during recent decades, have sustained nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return.[6] *General Motors Corp.* v. *Washington*, 377 U. S. 436 (1964); *Memphis Gas Co.* v. *Stone*, 335 U. S. 80 (1948). Cf. *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). *General Motors Corp., supra*, states the controlling test:

"[T]he validity of the tax rests upon whether the

[6] "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940).

> State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . . As was said in *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444 (1940), '[t]he simple but controlling question is whether the state has given anything for which it can ask return.'" 377 U. S., at 440–441.

Amended § 601 as applied to appellant satisfies this test. First, the Supreme Court of Louisiana held that the operating incidences of the franchise tax are the three localized alternative incidences provided in § 601: (1) doing business in Louisiana in the corporate form; (2) the exercise of a corporation's charter or the continuance of its charter within the State; and (3) the owning or using any part of its capital, plant, or other property in Louisiana in a corporate capacity. We necessarily accept this construction of amended § 601 by Louisiana's highest court. 289 So. 2d, at 97. Second, the court found that the powers, privileges, and benefits Louisiana bestows incident to these activities were sufficient to support a tax on doing business in the corporate form in that State. We perceive no basis upon which we can say that this is not in fact the case. Our pertinent precedents therefore require affirmance of the State Supreme Court's judgment.

Memphis Gas Co. v. *Stone, supra,* sustained a similar franchise tax imposed by Mississippi on a foreign pipeline corporation engaged exclusively in an interstate business even though the company had not qualified in Mississippi.

Memphis Natural Gas Co., a Delaware corporation, owned and operated a natural gas pipeline extending from Louisiana, through Arkansas and Mississippi, to Memphis and other parts of Tennessee. Approximately 135 miles of the pipeline were located in Mississippi, and two of the corporation's compressing stations were located in that State. The corporation engaged in no intrastate commerce in Mississippi, and had only one customer there. It had not qualified under the corporation laws of Mississippi. It had neither an agent for the service of process nor an office in that State, and its only employees there were those necessary for the maintenance of the pipeline.

The corporation paid all ad valorem taxes assessed against its property in Mississippi. In addition to these taxes, however, Mississippi imposed a "franchise or excise tax" upon all corporations "doing business" within the State. The statute defined "doing business" in terms that suggest it may have been the model for § 601, that is, "[to] mean and [to] include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organization." 335 U. S., at 82.[7] The Supreme Court of Mississippi held, as did the Supreme Court of Louisiana here, 289 So. 2d, at 101, that the tax was " 'an exaction . . . as a recompense for . . . protection of . . . the local activities in maintaining, keeping in repair, and otherwise manning the facilities of the system throughout the 135 miles of its line in this State.' "

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[7] Like § 601, the Mississippi statute, Code Ann. § 9313 (1943), provided in part:

"It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

335 U. S., at 84. In affirming the judgment of that court, Mr. Justice Reed, in a plurality opinion, said:

> "We think that the state is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its borders. Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce. This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." *Id.*, at 96.

This conclusion is even more compelled in the instant case since appellant voluntarily qualified under Louisiana law and therefore enjoys the same rights and privileges as a domestic corporation. La. Rev. Stat. Ann. § 12:306 (2) (Supp. 1975).[8] The Louisiana Supreme Court de-

[8] Louisiana does not require foreign corporations to qualify as a condition to carrying on their interstate business. Louisiana Rev. Stat. Ann. § 12:302 (Supp. 1975) expressly exempts foreign corporations that transact "any business in interstate or foreign commerce" from its requirement that foreign corporations obtain a certificate of authority from the Secretary of State before they transact business within the State. *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891), therefore, is inapposite. There Kentucky provided that an agent of an express company not incorporated under the laws of Kentucky could not carry on business in that State without first obtaining a license from the State. The Court held that this mandatory license requirement was unconstitutional because to "carry on interstate commerce is not a franchise or a privilege granted by the State . . . . We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." *Id.*, at 57–58. See *Graham Mfg. Co.* v. *Rolland*, 191 La. 757, 186 So. 93 (1939); *State* v. *American Railway Express Co.*,

fined appellant's powers and privileges as including "the legal status to sue and be sued in the Courts of our State, continuity of business without interruption by death or dissolution, transfer of property interests by the disposition of shares of stock, advantages of business controlled and managed by corporate directors, and the general absence of individual liability . . . ." 289 So. 2d, at 100. These privileges obviously enhance the value to appellant of its activities within Louisiana. See *Southern Gas Corp.* v. *Alabama*, 301 U. S. 148, 153 (1937); *Stone* v. *Interstate Natural Gas Co.*, 103 F. 2d 544 (CA5), aff'd, 308 U. S. 522 (1939). Cf. *Railway Express Agency* v. *Virginia* (*Railway Express II*), 358 U. S. 434 (1959).

III

Nevertheless, appellant contends that *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951), and *Railway Express Agency* v. *Virginia* (*Railway Express I*), 347 U. S. 359 (1954), require the conclusion that § 601 is unconstitutional as applied to appellant. The argument is without merit. *Spector* held invalid under the Commerce Clause a Connecticut tax based expressly "upon [the corporation's] franchise for the privilege of carrying on or doing business within the state . . . ." Similarly, *Railway Express I* invalidated Virginia's "annual license tax" imposed on express companies expressly "for the privilege of doing business" in the State. Thus both taxes, as express imposts upon the privilege of carrying on an exclusively interstate business, contained the same fatal constitutional flaw that led the Louisiana Court of Appeal to strike down the levy against appel-

159 La. 1001, 106 So. 544 (1924). An important consequence of qualification, of course, is the facilitation of the assessment and collection of state franchise taxes. Comment, Foreign Corporations—State Boundaries for National Business, 59 Yale L. J. 737, 746 (1950).

lant under § 601 before its amendment in 1970. "A tax is [an unconstitutional] direct burden, if laid upon the operation or act of interstate commerce." *Ozark Pipe Line* v. *Monier*, 266 U. S. 555, 569 (1925) (Brandeis, J., dissenting). The 1970 amendment however repealed that unconstitutional basis for the tax, and made § 601 constitutional by limiting its application to operating incidences of activities within Louisiana for which the State affords privileges and protections that constitutionally entitle Louisiana to exact a fairly apportioned and nondiscriminatory tax. *Spector* expressly recognized: "The incidence of the tax provides the answer. . . . The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." 340 U. S., at 608–609.[9]

Of course, an otherwise unconstitutional tax is not made the less so by masking it in words cloaking its actual thrust. *Railway Express II*, *supra*, at 441; *Railway Express I*, *supra*, at 363; *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227 (1908). "It is not a matter of labels." *Spector*, *supra*, at 608. Here, however, the Louisiana Legislature amended § 601 purposefully to remove any basis of a levy upon the privilege of carrying on an interstate business and narrowly to confine

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[9] Nor is this tax on carrying on business in the corporate form a "local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause." *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389, 395 (1952). Unlike the situation in *Memphis Steam Laundry*, Louisiana did not "carve out" an "incident from the integral economic process of interstate commerce," *id.*, at 393, and then proceed to tax that incident. There was and is no requirement that appellant assume the corporate form to do interstate business in Louisiana, and indeed state law specifically exempts foreign corporations engaging in interstate commerce from the certificate requirement. See n. 8, *supra*.

the impost to one related to appellant's activities within the State in the corporate form. Since appellant, a foreign corporation qualified to carry on its business in corporate form, and doing business in Louisiana in the corporate form, thereby gained benefits and protections from Louisiana of value and importance to its business, the application of that State's fairly apportioned and nondiscriminatory levy to appellant does not offend the Commerce Clause. The tax cannot be said to be imposed upon appellant merely or solely for the privilege of doing interstate business in Louisiana. It is, rather, a fairly apportioned and nondiscriminatory means of requiring appellant to pay its just share of the cost of state government upon which appellant necessarily relies and by which it is furnished protection and benefits.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I share the misgivings that are suggested by MR. JUSTICE STEWART in his dissent, but I join the judgment of the Court.

I am not at all satisfied that this Court's decisions of the past 30 years, some of them by sharply divided votes, are so plain and so analytically consistent as the Court's opinion would seem to imply. Thus, I find it difficult to reconcile *Spector Motor Service* v. *O'Connor,* 340 U. S. 602 (1951), with today's holding. And if the present case had gone the other way, I would find it difficult to reconcile the judgment with *Memphis Gas Co.* v. *Stone,* 335 U. S. 80 (1948). If, however, the Court's decisions of the past are consistent—and if there is consistency between what the Louisiana Legislature and that

State's courts have done in Colonial's 1969 case and in the present one—then, for me, the legal distinctions this Court and the Louisiana courts (under the compulsion of our decisions) have drawn are too finespun and far too gossamer. They fail to provide what taxpayers and the lawyers who advise them have a right to expect, namely, a firm and solid basis of differentiation between that which runs afoul of the Commerce Clause, and that which is consistent with that Clause. It makes little constitutional sense—and certainly no practical sense—to say that a State may not impose a fairly apportioned, nondiscriminatory franchise tax with an adequate nexus upon the conduct of business in interstate commerce, but that it may impose that same tax upon the conduct of business in interstate commerce "in a corporate form" or, for that matter, in partnership or individual form. Tr. of Oral Arg. 28–31. Certainly to the lay mind, or to any mind other than the purely legal, these are distinctions with little substantive difference and this is taxation by semantics.

I therefore feel that the Court should face the issue and make the choice. I would make that choice in favor of *Memphis Gas*, as buttressed by the philosophy and holding of *Northwestern Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), and against *Spector*. *Spector*, it seems to me, is a derelict and an aberration, and I would discard it. I would hold that in this day, when the realities of "Our Federalism" * have become apparent, and when the ability of our States and of the Federal Government to coexist have matured, a state franchise tax that does not threaten interstate commerce by being discriminatory, or unfairly apportioned, or devoid of sufficient nexus, passes constitutional muster under the Commerce Clause and may be imposed in the

**Younger* v. *Harris*, 401 U. S. 37, 44 (1971).

absence of congressional proscription. On this record, Louisiana's corporation franchise tax meets that standard.

MR. JUSTICE STEWART, dissenting.

All agree that the appellant is engaged *exclusively* in interstate commerce. Yet the Court says that Louisiana can nonetheless impose this franchise tax upon the appellant because it is for the privilege of engaging in interstate commerce "in [the] corporate form." * Under this reasoning, the State could impose a like franchise tax for the privilege of carrying on an exclusively interstate business "in the partnership form"—or, for that matter, in the form of an individual proprietorship. For, whatever its form, the exclusively interstate business would still be "owning or using [a] part of its capital, plant or other property in Louisiana," *ante,* at 109, and would still be "furnished" equivalent "protection and benefits" by the State, *ante,* at 114.

The fact is that Louisiana has imposed a franchise tax upon the appellant for the privilege of carrying on an exclusively interstate business. Under our established precedents, such a tax is constitutionally impermissible. *Spector Motor Service* v. *O'Connor,* 340 U. S. 602; *Railway Express Agency* v. *Virginia,* 347 U. S. 359. I could understand if the Court today were forthrightly to overrule these precedents and hold that a state franchise tax upon interstate commerce is constitutionally valid, so long as it is not discriminatory. But I cannot understand how the Court can embrace the wholly specious reasoning of the Supreme Court of Louisiana in this case.

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*The appellant is not, of course, incorporated in Louisiana.

Syllabus

KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* HELFANT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–80. Argued March 25, 1975—Decided April 28, 1975*

One Helfant, who was a Municipal Court judge and a member of the New Jersey bar, brought this action in District Court permanently to enjoin the State Attorney General and other officials from proceeding with the prosecution of an indictment of Helfant, which had grown out of grand jury testimony that he had given as a result of assertedly collusive coercion by a State Deputy Attorney General and members of the New Jersey Supreme Court, whose significant involvement allegedly made it impossible for Helfant to receive a fair trial in the New Jersey state courts. The District Court issued an order dismissing the complaint, on the basis of *Younger* v. *Harris*, 401 U. S. 37, which held that unless "extraordinary circumstances" exist in which irreparable injury can be shown even in the absence of bad faith and harassment, a federal court must not intervene by way of granting injunctive or declaratory relief against a state criminal prosecution. The Court of Appeals, though holding that a permanent injunction of the state criminal prosecution would be inappropriate, reversed the order and remanded the case for an evidentiary hearing on Helfant's coercion charge and for entry of a declaratory judgment, based upon that hearing, on the question whether his grand jury testimony was admissible in the state criminal trial. Helfant claims that federal judicial intervention is warranted under *Younger*'s "extraordinary circumstances" exception because of the assertedly coercive involvement of the members of the New Jersey Supreme Court, who have formidable supervisory and administrative powers over the state court system. *Held:*

1. Helfant's claim that he cannot obtain a fair hearing in the state courts is without merit, and the facts he alleges do not bring this matter within any exception to the *Younger* rule so as to warrant the granting of injunctive relief against the state criminal prosecution. Pp. 123–129.

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*Together with No. 74–277, *Helfant* v. *Kugler, Attorney General of New Jersey, et al.*, also on certiorari to the same court.

(a) The New Jersey judicial system safeguards a defendant like Helfant against denial of due process of law in the state trial or appellate process by providing that a defendant can disqualify a particular judge from participating in his case, mandating disqualification of an appellate judge whose participation might reasonably lead counsel to believe he was biased, and providing for temporary assignment of substitute Justices where a Supreme Court quorum is lacking. Pp. 126–128.

(b) Four of the six members (including the then Chief Justice) of the New Jersey Supreme Court who participated in the alleged coercion are no longer on that court, and of the two remaining members only one was active in the conduct complained of. P. 128.

(c) The Chief Justice is the administrative head of the New Jersey court system, and the incumbent played no part in the allegedly coercive conduct. P. 128.

2. Federal courts should refuse to intervene in state criminal proceedings to suppress the use of evidence even when claimed to have been unlawfully obtained, *Stefanelli* v. *Minard*, 342 U. S. 117; *Perez* v. *Ledesma*, 401 U. S. 82, and the declaratory judgment procedure ordered by the Court of Appeals would contravene the basic policy against federal interference with state prosecutions as much as would the granting of the injunctive relief sought by Helfant. Pp. 129–131.

500 F. 2d 1188, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., took no part in the consideration or decision of the cases. BRENNAN, J., took no part in the decision of the cases.

David S. Baime, Deputy Attorney General of New Jersey, argued the cause for petitioners in No. 74–80 and respondents in No. 74–277. With him on the briefs were *William F. Hyland*, Attorney General, and *Glenn E. Kushel*, Deputy Attorney General.

Marvin D. Perskie argued the cause for petitioner in No. 74–277 and respondent in No. 74–80. With him on the briefs was *Patrick T. McGahn, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Edwin H. Helfant brought this action in Federal District Court to enjoin the Attorney General of New Jersey and other New Jersey officials from proceeding with the prosecution of an indictment pending against him in that State.[1] His complaint alleged that he had been coerced into testifying before a state grand jury by the concerted action of a State Deputy Attorney General and members of the New Jersey Supreme Court, and that the indictment, charging him with obstruction of justice and false swearing, had grown out of that coerced testimony. His complaint further alleged that the significant role played by the members of the New Jersey Supreme Court in coercing his testimony made it impossible for him to receive a fair trial in the state-court system.

The District Court dismissed the complaint on the ground that the principles of *Younger* v. *Harris*, 401 U. S. 37, precluded federal intervention in the state criminal proceeding. A three-judge panel of the Court of Appeals for the Third Circuit reversed that order and remanded the case to the District Court for a hearing on the merits of Helfant's request for a permanent injunction. 484 F. 2d 1277. Upon petition of the defendant state officials (hereinafter the State), the Court of Appeals then set the case for an en banc rehearing. The full Court of Appeals held that a permanent injunction against the state criminal prosecution would be inappropriate, but, with three judges dissenting, nonetheless reversed the trial court's order of dismissal. The Court

[1] The complaint relied upon 42 U. S. C. § 1983 in seeking injunctive relief against the state court proceedings. Federal jurisdiction was grounded on 28 U. S. C. § 1343 (3).

of Appeals remanded the case for the purpose of an evidentiary hearing in the District Court on Helfant's charge that his grand jury testimony had been coerced, and for the entry of a declaratory judgment, based upon that hearing, on the question whether Helfant's grand jury testimony should be admitted into evidence at the state criminal trial. The District Court was directed to enjoin further proceedings in the state criminal prosecution pending entry of its declaratory judgment. 500 F. 2d 1188.

The State filed a petition for a writ of certiorari, seeking review of the Court of Appeals' remand to the District Court for an evidentiary hearing and declaratory judgment on the issue of coercion. Helfant filed a cross-petition for a writ of certiorari, challenging the Court of Appeals' decision that permanent injunctive relief was not warranted. We granted both petitions to consider the propriety of federal-court intervention in pending state criminal proceedings in the circumstances of this case. 419 U. S. 1019.

I

Helfant was a Municipal Court Judge and a member of the New Jersey bar. He was subpoenaed to appear on October 18, 1972, before a state grand jury. There he was advised that he was a target of the grand jury's investigation into an episode allegedly involving corruption of the process of state criminal justice. Upon the advice of counsel, he invoked his constitutional privilege against compulsory self-incrimination and refused to testify before the grand jury. He was again subpoenaed to appear before the grand jury on November 8, 1972. On November 6, 1972, he received a telephone call from the Administrative Director of the New Jersey Courts requesting him to come to the conference room of the

Justices of the New Jersey Supreme Court on the morning of November 8 just before his scheduled grand jury appearance.[2] He complied with this request.

In his federal complaint, Helfant alleged that at that meeting he was interrogated by the Chief Justice and other members of the Supreme Court concerning the subject matter of the grand jury investigation, including matters not then public, and was also sharply questioned about the propriety of a Municipal Judge's invoking the privilege against compulsory self-incrimination before a grand jury. The complaint further alleged that the Justices' questions were based on grand jury minutes that had been provided them by the Deputy Attorney General who was conducting the grand jury investigation, and who had been present in the conference room of the Supreme Court both before and after Helfant's interview.

The federal complaint went on to allege that as a result of this questioning Helfant, "fearing not only the loss of Judgeship, but for his accreditation as a member of the bar as well," indicated to the Justices that he would waive his privilege and testify in full before the grand jury. After leaving the conference room, Helfant did testify before the grand jury, denying any improper involvement in the episode under investigation. Some two months later the grand jury returned an indictment charging Helfant with conspiracy to obstruct justice, obstruction of justice, compounding a felony, and with four counts of false swearing.

The federal complaint finally alleged that federal injunctive relief was necessary because it would be im-

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[2] The grand jury was then sitting in Trenton, N. J., in the State House Annex on the same floor as the conference room of the Justices of the State Supreme Court. See 500 F. 2d 1188, 1190.

possible for Helfant to receive a fair trial in the New Jersey state courts:

> "As a result of the intrusion by the Deputy Attorney General and the disclosure to the Supreme Court of factual matters involved in a Grand Jury investigation during pendency of that investigation, and because of the intrusion of the New Jersey Supreme Court into the Grand Jury investigation and the communication between the Supreme Court of New Jersey and the Deputy Attorney General conducting the Grand Jury investigation, the plaintiff herein is made to suffer great, immediate, substantial and irreparable harm in that he must attempt to defend criminal charges brought in a State in which there has been prejudicial collusion directly affecting plaintiff, whether intentional or inadvertent between the Judicial and Executive branches of the New Jersey State government. Plaintiff is being made to defend criminal charges which have been obtained, inter alia, as a result of that collusion, and the deprivation of plaintiff's constitutional rights by not too subtle cooperative coercion on the part of the defendants. Furthermore, in the event of his conviction upon any one of the charges presently pending against him, plaintiff's only recourse would be review by the State Courts and ultimately the New Jersey Supreme Court, which Court he has alleged has been involved in the prosecution of the charges against him. Thus, any defense by plaintiff in other charges in State Court would be totally futile, because he would have to defend charges at the trial level, with the Trial Court fully cognizant of the 'interest' of the Supreme Court in the charges, and could only seek review of his pretrial motions and trial motions and appeals in the same court that he

> alleges has unlawfully injected itself into the prosecution of the charges against him and unlawfully deprived him of his constitutional rights. The conclusion must be that the State is engaging in a bad faith prosecution of the plaintiff herein, and for this reason he seeks a permanent injunction against the further prosecution of the State proceedings . . . ."

II

In *Younger* v. *Harris, supra,* and its companion cases,[3] the Court re-examined the principles governing federal judicial intervention in pending state criminal cases, and unequivocally reaffirmed "the fundamental policy against federal interference with state criminal prosecutions." 401 U. S., at 46. This policy of restraint, the Court explained, is founded on the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.,* at 43–44. When a federal court is asked to interfere with a pending state prosecution, established doctrines of equity and comity are reinforced by the demands of federalism, which require that federal rights be protected in a manner that does not unduly interfere with the legitimate functioning of the judicial systems of the States. *Id.,* at 44. Accordingly, the Court held that in the absence of exceptional circumstances creating a threat of irreparable injury " 'both great and immediate,' " a federal court must not intervene by way of either injunction or declaratory judgment in a pending state criminal prosecution.

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[3] *Samuels* v. *Mackell,* 401 U. S. 66; *Boyle* v. *Landry,* 401 U. S. 77; *Perez* v. *Ledesma,* 401 U. S. 82; *Dyson* v. *Stein,* 401 U. S. 200; *Byrne* v. *Karalexis,* 401 U. S. 216.

Although the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute "irreparable injury" in the "special legal sense of that term," *id.*, at 46, the Court in *Younger* left room for federal equitable intervention in a state criminal trial where there is a showing of "bad faith" or "harassment" by state officials responsible for the prosecution, *id.*, at 54, where the state law to be applied in the criminal proceeding is " 'flagrantly and patently violative of express constitutional prohibitions,' " *id.*, at 53, or where there exist other "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Ibid.* In the companion case of *Perez* v. *Ledesma,* 401 U. S. 82, the Court explained that "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecutions appropriate." *Id.*, at 85. See *Mitchum* v. *Foster,* 407 U. S. 225, 230–231.

The policy of equitable restraint expressed in *Younger* v. *Harris,* in short, is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. See *Steffel* v. *Thompson,* 415 U. S. 452, 460. Only if "extraordinary circumstances" render the state court incapable of fairly and fully adjudicating the federal issues before it, can there be any relaxation of the deference to be accorded to the state criminal process. The very nature of "extraordinary circumstances," of course, makes it impossible to anticipate and define every situation that might create a sufficient threat of such great, immediate, and irrep-

arable injury as to warrant intervention in state criminal proceedings.[4] But whatever else is required, such circumstances must be "extraordinary" in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation.

As the Court of Appeals recognized, Helfant's allegations that members of the New Jersey Supreme Court were involved in coercing his grand jury testimony must, for present purposes, be assumed to be true.[5] It is

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[4] The scope of the exception to the general rule of equitable restraint for "other extraordinary circumstances" has been left largely undefined by this Court. In *Younger* v. *Harris*, 401 U. S. 37, however, the Court gave one example of the type of circumstances that could justify federal intervention even in the absence of either harassment or bad-faith enforcement of a state criminal statute, by quoting from *Watson* v. *Buck*, 313 U. S. 387, 402:

"'It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 401 U. S., at 53–54.

The Court then stated: "Other unusual situations calling for federal intervention might also arise, but there is no point in our attempting now to specify what they might be." *Id.*, at 54.

Gibson v. *Berryhill*, 411 U. S. 564, supplied another example of such "extraordinary circumstances." In that case the Court found it unnecessary to decide whether the rule of *Younger* v. *Harris* applies with the same force when state civil, rather than criminal, proceedings are pending because "the predicate for a *Younger* v. *Harris* dismissal was lacking . . . . [T]he appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board." 411 U. S., at 577.

[5] Although the District Court held a limited evidentiary hearing on Helfant's request for a preliminary injunction, the State's motion to dismiss was granted pursuant to Fed. Rule Civ. Proc. 12 (b) (6) without either findings of fact or conclusions of law. Accordingly,

Helfant's position that these are such "extraordinary circumstances" as to justify enjoining his criminal trial in view of the formidable supervisory and administrative powers exercised by the New Jersey Supreme Court over the entire state-court system. We cannot agree that these facts bring this litigation within any exception to the basic *Younger* rule.[6]

The New Jersey Constitution provides that the Chief Justice of the State Supreme Court shall be the "administrative head" of all the courts in the State. Art. VI, § 7, ¶ 1. The State Constitution further provides that "[t]he Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears." *Id.*, ¶ 2.

The New Jersey Supreme Court itself has explained that the State Constitution vests it with "plenary responsibility for the administration of all courts in the State." *State* v. *De Stasio*, 49 N. J. 247, 253, 229 A. 2d 636, 639. "Thus this court is charged with responsibility for the overall performance of the judicial branch. Responsibility for a result implies power reasonably necessary to

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in determining whether the complaint stated a claim upon which relief could be granted, its factual allegations were to be taken as true. See, *e. g.*, *Cruz* v. *Beto*, 405 U. S. 319, 322.

[6] Although Helfant argues that the collusive actions of members of the State Supreme Court and the Deputy Attorney General demonstrate prosecutorial bad faith warranting federal intervention, "bad faith" in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction. See *Perez* v. *Ledesma*, 401 U. S., at 85. Nothing in Helfant's complaint would support a finding of "bad faith," as so defined. However he may choose to describe it, the gravamen of Helfant's complaint is that members of the New Jersey judiciary have become so personally involved in his case that it is impossible for him to receive a fair hearing in the state-court system.

achieve it." *In re Mattera*, 34 N. J. 259, 272, 168 A. 2d 38, 45.

It is clear, therefore, that the State Supreme Court, and particularly its Chief Justice, are vested with considerable administrative authority over the trial court that will initially determine Helfant's federal constitutional claims if the criminal prosecution is allowed to proceed. And, of course, those claims are predicated in large measure on charges of improper conduct on the part of some Justices of the New Jersey Supreme Court. It is impossible to conclude from these considerations, however, that the objectivity of the entire New Jersey court system has been irretrievably impaired so far as Helfant is concerned.

Helfant does not allege, and it certainly cannot be assumed, that no trial judge in New Jersey will be capable of impartially deciding his case simply because of the alleged previous involvement of members of the New Jersey Supreme Court. To be sure, it is conceivable that there might be a judge in the State who, in an effort to curry favor or to avoid administrative transfer to a less desirable assignment, would decide the case with an eye to the supposed attitudes of his superiors in the judicial hierarchy. But even if such a judge were assigned to hear Helfant's case, the right to a fair trial would be protected by the New Jersey rule that permits a defendant to disqualify a particular judge from participating in his case. See New Jersey Court Rules 1:12–1 to 1:12–3.

Although appellate review of a conviction at the trial level might ultimately reach the State Supreme Court, New Jersey requires judges personally interested "in the event of the action" to disqualify themselves. Indeed, disqualification is mandatory whenever there is any reason "which might preclude a fair and unbiased hear-

ing and judgment, *or which might reasonably lead counsel or the parties to believe so.*" Rules 1:12–1 (e) and (f) (emphasis added). If, because of such disqualifications, the Supreme Court were deprived of the requisite five-member quorum, temporary assignment of substitute Justices is authorized by the New Jersey Court Rules. Rule 2:13–2. Thus, the New Jersey judicial system provides procedural safeguards to guarantee that Helfant will not be denied due process of law in the state trial or appellate process.

It is worth noting, furthermore, that four of the six Justices who attended the meeting with Helfant are no longer members of the New Jersey Supreme Court. Of the two remaining members, only one was alleged to have been active in the questioning. The other active interrogator named by Helfant, the then Chief Justice, is among the four former Justices who are no longer members of the court.

Moreover, it is not the New Jersey Supreme Court, or its members, but the Chief Justice, who is the "administrative head" of the New Jersey court system. Thus, it is the present Chief Justice who wields the extensive supervisory and administrative power relied upon by Helfant to support his prayer for federal equitable relief. And the present Chief Justice played no part whatsoever in the allegedly coercive meeting that forms the core of Helfant's constitutional claim. In sum, even if it could be assumed, *arguendo*, that the former Chief Justice and the other participants in the meeting with Helfant might have been incapable of impartially reviewing his case, there can be no such assumption of bias with respect to the new Chief Justice and the other new members of the New Jersey Supreme Court.[7]

[7] Similarly, there can be no reason to assume that trial and appellate judges under the supervisory authority of the new Chief

Accordingly, Helfant's claim that he cannot receive a fair hearing in the state-court system is without foundation. The Court of Appeals, therefore, properly affirmed the District Court's dismissal of his prayer for permanent injunctive relief.

III

Although the Court of Appeals held that there was in this case "no reason to depart from the formidable general policy of 'leaving generally to the state courts the trial of criminal cases arising under state laws . . . ,'" 500 F. 2d, at 1196,[8] it nonetheless concluded that federal declaratory relief on the question of the admissibility in evidence of Helfant's grand jury testimony was in order. It was the court's view that federal factfinding on this narrow issue would free the New Jersey courts from even the appearance of partiality. By thus assuring the integrity of the state judicial process without ultimately interfering with the State's right to enforce its own criminal laws, the court reasoned, federal judicial action would advance, rather than offend, "the mutual relationship poignantly described by Justice Black as 'Our Federalism.'" *Id.*, at 1197. The court accordingly required the District Court to enjoin further proceedings in the state criminal trial until an evidentiary hearing could be held in the federal court to determine whether Helfant's grand jury testimony should be admitted as evidence in that trial.

This procedure closely resembles the course rejected by this Court in *Stefanelli* v. *Minard*, 342 U. S. 117. In *Stefanelli* the Court affirmed the refusal of a Federal District Court to entertain proceedings to suppress the use in

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Justice will be influenced by the role played by former members of the State Supreme Court in inducing Helfant's grand jury testimony.

[8] The internal quotation is from *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163.

a pending state prosecution of evidence allegedly obtained in an unlawful search. As the Court explained: "If the federal equity power must refrain from staying State prosecutions outright to try the central question of the validity of the statute on which the prosecution is based, how much more reluctant must it be to intervene piecemeal to try collateral issues." *Id.*, at 123. The Court thus held that "federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." *Id.*, at 120. Similarly, in *Perez* v. *Ledesma, supra,* the Court held: "[T]he propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals, . . . subject, of course, to review by certiorari or appeal in this Court or, in a proper case, on federal habeas corpus." 401 U. S., at 84–85. See also *Cleary* v. *Bolger,* 371 U. S. 392.

These precedents clearly establish that at least in the absence of "extraordinary circumstances" federal courts must refuse to intervene in state criminal proceedings to suppress the use of evidence claimed to have been obtained through unlawful means.[9] Even if concern for the *appearance* of complete impartiality could in some case conceivably justify such disruption of state criminal proceedings, this is not such a case. By providing for mandatory disqualification of a judge of any court whenever one of the parties or his counsel rationally believes there exists any reason that might preclude a fair and unbiased hearing, N. J. Court Rule 1:12–1 (f), New

[9] In *Dombrowski* v. *Pfister,* 380 U. S. 479, 485 n. 3, the Court noted: "It is difficult to think of a case in which an accused could properly bring a state prosecution to a halt while a federal court decides his claim that certain evidence is rendered inadmissible by the Fourteenth Amendment."

Jersey has preserved the appearance of judicial objectivity. And, as explained in Part II, *supra,* Helfant's claim that he cannot in fact obtain a fair hearing in the state-court system is without merit.

In short, the basic policy against federal interference with pending state prosecutions would be frustrated as much by the declaratory judgment procedure ordered by the Court of Appeals as it would be by the permanent injunction originally sought by Helfant. See *Samuels* v. *Mackell,* 401 U. S. 66, 73. Accordingly, the judgment of the Court of Appeals is vacated, and the cases are remanded to that court with directions to enter a judgment affirming the District Court's dismissal of the complaint.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of these cases. MR. JUSTICE BRENNAN took no part in the decision of these cases.

NATIONAL LABOR RELATIONS BOARD ET AL. *v.* SEARS, ROEBUCK & CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–1233. Argued January 14, 1975—Decided April 28, 1975

Under the procedure for adjudicating unfair labor practice cases under the National Labor Relations Act, if a National Labor Relations Board (NLRB) Regional Director, with whom unfair labor practice charges are filed in the first instance and to whom the NLRB's General Counsel has delegated the initial power to decide whether or not to issue a complaint, believes that the charge has no merit, the charging party has a right to appeal to the General Counsel. If this right is exercised, the file is sent to the Office of Appeals in the General Counsel's Office, and the Appeals Committee then decides either to sustain or overrule the Regional Director, and sets forth the decision and supporting reasons in an Appeals Memorandum, which is cleared through the General Counsel and sent to the Regional Director, who must follow its instructions. In addition to this appeals process, the General Counsel *requires* the Regional Director, before reaching an initial decision in connection with unfair labor practice charges raising certain issues, to submit the matter to the General Counsel's Advice Branch, and in other kinds of unfair labor practice cases the Regional Directors are *permitted* to seek the Advice Branch's advice. The Advice Branch, after studying the matter, makes a recommendation to the General Counsel, who then makes a "final determination" which is communicated to the Regional Director by way of an Advice Memorandum. Depending upon the conclusion reached in such memorandum, the Regional Director will either file a complaint or notify the complaining party of the decision not to proceed and of his right to appeal. Respondent, after the General Counsel had declined to disclose all Advice and Appeals Memoranda pertaining to certain matters issued within a certain number of years, filed suit to require disclosure of such memoranda, alleging violations of the Freedom of Information Act, 5 U. S. C. § 552. The District Court granted respondent's motion for a summary judgment, holding that the Advice Memoranda were "instructions to staff that affect a member of the public" required

to be disclosed under § 552 (a)(2)(C), that the Appeals Memoranda were "final opinions" required to be disclosed under § 552 (a)(2)(A), and that both kinds of memoranda were not exempt from disclosure as "intra-agency memorandums" under § 552 (b)(5) (Exemption 5). The Court of Appeals affirmed without opinion. *Held:*

1. Exemption 5 can never apply to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency. Pp. 150–154.

2. Exemption 5 covers the attorney work-product rule which clearly applies to memoranda prepared by an attorney in contemplation of litigation and setting forth the attorney's theory of the case and his litigation strategy. Pp. 154–155.

3. Those Advice and Appeals Memoranda that explain decisions by the General Counsel not to file a complaint are "final opinions" made in the "adjudication of cases" within the meaning of § 552 (a)(2)(A), and hence fall outside the scope of Exemption 5 and must be disclosed. Pp. 155–159.

(a) In the case of decisions not to file a complaint, each of such memoranda effects as "final" a "disposition" as an administrative decision can, and disclosure of these memoranda would not intrude on predecisional processes nor would protecting them improve the quality of agency decisions within the purposes of the "executive privilege" embodied in Exemption 5, since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director has no decision to make but is bound to dismiss the charge. P. 155.

(b) Moreover, the General Counsel's decisions not to file complaints together with the Advice and Appeals Memoranda explaining them, are precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret. Pp. 155–157.

4. Those Advice and Appeals Memoranda that explain decisions by the General Counsel to file a complaint and commence litigation before the NLRB are not "final opinions" made in the "adjudication of cases" within the meaning of § 552 (a)(2)(A) and do fall within the scope of Exemption 5. Pp. 159–160.

(a) The filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case, since the case will be litigated before and decided by the NLRB,

and the General Counsel will be responsible for advocating the charging party's position before the NLRB. P. 159.

(b) Since the memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product, and at the same time the public's interest in disclosure is substantially reduced by the fact that the basis for the General Counsel's decision to file a complaint will develop in the course of litigation before the NLRB and that the "law" with respect to these cases will ultimately be made not by the General Counsel but by the NLRB or the courts. Pp. 159–160.

5. The documents incorporated by reference in nonexempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda under Exemption 5, and if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it is covered by some exemption other than Exemption 5. P. 161.

6. Petitioners are not required to produce or create explanatory material in those instances in which an Appeals Memorandum refers to the "circumstances of the case," nor are they required to identify, after the fact, those pre-existing documents that contain the "circumstances of a case" to which an opinion may have referred, and which are not identified by the party seeking disclosure. Pp. 161–162.

7. This Court will not adjudicate petitioners' claim that the Advice and Appeals Memoranda are exempt from disclosure under 5 U. S. C. § 552 (b)(7) (Exemption 7) as "investigatory files compiled for law enforcement purposes." That claim was not made in the District Court and, although it was made in the Court of Appeals, that court affirmed without opinion on the basis of its prior decision in another case not involving Exemption 7, and it is therefore not clear whether that court passed on the claim. Moreover, Congress passed a limiting amendment to Exemption 7 after petitioners filed their brief, and thus any decision of the Exemption 7 issue in this case would have to be made under the exemption as amended, which could not have been done by the courts below. Pp. 162–165.

8. Nor will this Court reach petitioners' claim that the Advice and Appeals Memoranda are exempt from disclosure under § 552 (b)(2) (Exemption 2) as documents "related solely to the

internal personnel rules and practices of an agency," that claim not having been raised below. P. 165.

9. Petitioners' claim that the documents incorporated by reference in Advice and Appeals Memoranda, which were previously protected from disclosure by Exemption 7, should not lose their exempt status by reason of incorporation, has merit, since a document protected by Exemption 7 does not become disclosable solely because it is referred to in a "final opinion," and accordingly the case must be remanded to the District Court for a determination whether such documents are protected by Exemption 7, as amended. Pp. 165–167.

156 U. S. App. D. C. 303, 480 F. 2d 1195, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., concurred in the judgment. POWELL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Friedman argued the cause for petitioners. With him on the briefs were *Solicitor General Bork, Allan Abbot Tuttle, Peter G. Nash, John S. Irving, Patrick Hardin,* and *Norton J. Come.*

Gerard C. Smetana argued the cause for respondent. With him on the brief were *Lawrence M. Cohen, Jeffrey S. Goldman,* and *Alan Raywid.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The National Labor Relations Board (the Board) and its General Counsel seek to set aside an order of the United States District Court directing disclosure to respondent, Sears, Roebuck & Co. (Sears), pursuant to

*Briefs of *amici curiae* urging affirmance were filed by *Milton Smith* and *Jerry Kronenberg* for the Chamber of Commerce of the United States; by *Carol A. Cowgill, Peter H. Schuck, Marvin M. Karpatkin,* and *Melvin L. Wulf* for the American Civil Liberties Union et al.; and by *Alan B. Morrison* for Freedom of Information Clearinghouse.

the Freedom of Information Act, 5 U. S. C. § 552 (Act), of certain memoranda, known as "Advice Memoranda" and "Appeals Memoranda," and related documents generated by the Office of the General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints.

The Act's background and its principal objectives are described in *EPA* v. *Mink*, 410 U. S. 73, 79–80 (1973), and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter S. Rep. No. 813); *EPA* v. *Mink*, *supra*, at 80. As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. Certain documents described in 5 U. S. C. § 552 (a)(1) such as "rules of procedure" must be published in the Federal Register; others, including "final opinions . . . made in the adjudication of cases," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," described in 5 U. S. C. § 552 (a)(2),[1] must be indexed and made available to a

[1] Title 5 U. S. C. § 552 (a)(2) provides in part:

"Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

"unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted in-

member of the public on demand, H. R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966) (hereinafter H. R. Rep. No. 1497). Finally, and more comprehensively, all "identifiable records" must be made available to a member of the public on demand. 5 U. S. C. § 552 (a)(3).[2] The Act expressly states, however, that the disclosure obligation "does not apply" to those documents described in the nine enumerated exempt categories listed in § 552 (b).[3]

Sears claims, and the courts below ruled, that the memoranda sought are expressions of legal and policy decisions already adopted by the agency and constitute "final opinions" and "instructions to staff that affect a member of the public," both categories being expressly disclos-

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vasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. . . ."

[2] Title 5 U. S. C. § 552 (a)(3) at the time in question provided in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. . . ."

[3] The relevant exempt categories are those described in Exemptions 2, 5, and 7. With respect to them, the statute provides:

"This section does not apply to matters that are—

. . . . . .

"(2) related solely to the internal personnel rules and practices of an agency;

. . . . . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ;

. . . . . .

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . . ."

able under § 552 (a)(2) of the Act, pursuant to its purposes to prevent the creation of "secret law." In any event, Sears claims, the memoranda are nonexempt "identifiable records" which must be disclosed under § 552 (a)(3). The General Counsel, on the other hand, claims that the memoranda sought here are not final opinions under § 552 (a)(2) and that even if they are "identifiable records" otherwise disclosable under § 552 (a)(3), they are exempt under § 552 (b), principally as "intra-agency" communications under § 552 (b)(5) (Exemption 5), made in the course of formulating agency decisions on legal and policy matters.

I

Crucial to the decision of this case is an understanding of the function of the documents in issue in the context of the administrative process which generated them. We deal with this matter first. Under § 1 *et seq.* of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. § 151 *et seq.*, the process of adjudicating unfair labor practice cases begins with the filing by a private party of a "charge," §§ 3 (d) and 10 (b), 29 U. S. C. §§ 153 (d) and 160 (b); 29 CFR § 101.2 (1974); *Auto Workers* v. *Scofield*, 382 U. S. 205, 219 (1965); *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 17–18 (1943). Although Congress has designated the Board as the principal body which adjudicates the unfair labor practice case based on such charge, 29 U. S. C. § 160, the Board may adjudicate only upon the filing of a "complaint"; and Congress has delegated to the Office of General Counsel "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U. S. C. § 153 (d); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advo-

cate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

In order to structure the considerable power which the administrative scheme gives him, the General Counsel has adopted certain procedures for processing unfair labor practice charges. Charges are filed in the first instance with one of the Board's 31 Regional Directors,[4] to whom the General Counsel has delegated the initial power to decide whether or not to issue a complaint. 29 CFR §§ 101.8, 102.10. A member of the staff of the Regional Office then conducts an investigation of the charge, which may include interviewing witnesses and reviewing documents. 29 CFR § 101.4. If, on the basis of the investigation, the Regional Director believes the charge has merit, a settlement will be attempted, or a complaint issued. If the charge has no merit in the Regional Director's judgment, the charging party will be so informed by letter with a brief explanation of the reasons. 29 CFR §§ 101.6, 101.8, 102.15, 102.19. In such a case, the charging party will also be informed of his right to appeal within 10 days to the Office of the General Counsel in Washington, D. C. 29 CFR §§ 101.6, 102.19.

If the charging party exercises this right, the entire file in the possession of the Regional Director will be sent to

[4] All of the officers and employees in the Regional Offices are under the general supervision of the General Counsel. 29 U. S. C. § 153 (d); National Labor Relations Board, Organization and Functions, § 202.1.1 *et seq.*, 32 Fed. Reg. 9588–9589 (1967).

the Office of Appeals in the General Counsel's Office in Washington, D. C. The case will be assigned to a staff attorney in the Office of Appeals, who prepares a memorandum containing an analysis of the factual and legal issues in the case. This memorandum is called an "agenda minute" [5] and serves as the basis for discussion at a meeting of the "Appeals Committee," which includes the Director and Associate Director of the Office of Appeals. At some point in this period, the charging party may make a written presentation of his case as of right and an oral presentation in the discretion of the General Counsel. 29 CFR § 102.19. If an oral presentation is allowed, the subject of the unfair labor practice charge is notified and allowed a similar but separate opportunity to make an oral presentation. In any event, a decision is reached by the Appeals Committee; and the decision and the reasons for it are set forth in a memorandum called the "General Counsel's Minute" or the "Appeals Memorandum." This document is then cleared through the General Counsel himself. If the case is unusually complex or important, the General Counsel will have been brought into the process at an earlier stage and will have had a hand in the decision and the expression of its basis in the Appeals Memorandum. In either event, the Appeals Memorandum is then sent to the Regional Director who follows its instructions. If the appeal is rejected and the Regional Director's decision not to issue a complaint is sustained, a separate document is prepared and sent by the General Counsel in letter form to the charging party, more briefly setting forth the reasons for the denial of his appeal.[6] The Appeals Memo-

[5] This document is *not* sought by Sears.

[6] In April 1971, the General Counsel ceased preparing a separate Appeals Memorandum in every case, and ceased preparing one in any case in which the Regional Director's decision not to issue a complaint was sustained. In this latter class of cases, the General

randa, whether sustaining or overruling the Regional Directors, constitute one class of documents at issue in this case.

The appeals process affords the General Counsel's Office in Washington some opportunity to formulate a coherent policy, and to achieve some measure of uniformity, in enforcing the labor laws. The appeals process alone, however, is not wholly adequate for this purpose: when the Regional Director initially decides to file a complaint, no appeal is available; and when the Regional Director decides not to file a complaint, the charging party may neglect to appeal. Accordingly, to further "fair and uniform administration of the Act," [7] the General Counsel requires the Regional Directors, before reaching an initial decision in connection with charges raising certain issues specified by the General Counsel, to submit the matter to the General Counsel's "Advice Branch," also located in Washington, D. C. In yet other kinds of cases, the Regional Directors are permitted to seek the counsel of the Advice Branch.

When a Regional Director seeks "advice" from the Advice Branch, he does so through a memorandum which sets forth the facts of the case, a statement of the issues on which advice is sought, and a recommendation. The case is then assigned to a staff attorney in the Advice Branch who researches the legal issues presented by reading prior Board and court decisions and "prior advice determinations in similar or related cases," Statement 3076,[8] and reports, orally or in

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Counsel adopted the policy of expanding the letter sent to the charging party and sending the Regional Director a copy of the letter.

[7] Statement submitted by the NLRB General Counsel to a House Labor Subcommittee on June 29, 1961 (hereinafter Statement), 1 CCH Lab. L. Rep. ¶ 1150, p. 3075 (1968).

[8] A subject-matter index to Advice—but not Appeals—Memoranda is maintained by the General Counsel.

writing, to a Committee or "agenda" made up of various high-ranking members of the General Counsel's Office. The Committee recommendation is then arrived at and communicated to the General Counsel, together with the recommendation of the Regional Director and any dissenting views in the Committee. In special cases, the General Counsel may schedule special agendas and invite other staff members to submit their recommendations. In either event, the General Counsel will decide the issue submitted, and his "final determination" will be communicated to the Regional Director by way of an Advice Memorandum. The memorandum will briefly summarize the facts, against the background of which the legal or policy issue is to be decided, set forth the General Counsel's answer to the legal or policy issue submitted together with a "detailed legal rationale," and contain "instructions for the final processing of the case." *Ibid.* Depending upon the conclusion reached in the memorandum, the Regional Director will either file a complaint or send a letter to the complaining party advising him of the Regional Director's decision not to proceed and informing him of his right to appeal. It is these Advice Memoranda which constitute the other class of documents of which Sears seeks disclosure in this case.

II

This case arose in the following context. By letter dated July 14, 1971, Sears requested that the General Counsel disclose to it pursuant to the Act all Advice and Appeals Memoranda issued within the previous five years on the subjects of "the propriety of withdrawals by employers or unions from multi-employer bargaining, disputes as to commencement date of negotiations, or conflicting interpretations in any other context of the Board's

Retail Associates (120 NLRB 388) rule."[9] The letter also sought the subject-matter index or digest of Advice and Appeals Memoranda.[10] The letter urged disclosure on the theory that the Advice and Appeals Memoranda are the only source of agency "law" on some issues. By letter dated July 23, 1971, the General Counsel declined Sears' disclosure request in full. The letter stated that Advice Memoranda are simply "guides for a Regional Director" and are not final; that they are exempt from

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[9] Sears later added a request for memoranda "dealing with the contract successorship doctrine of *Burns International Detective Agency* v. *NLRB* [then pending before this Court], as well as cases dealing with lockouts occurring in multi-employer bargaining situations."

[10] Sears was then in the process of preparing an appeal to the General Counsel in Washington from a refusal by the Regional Director to file a complaint with the Board in response to an unfair labor practice charge earlier filed by Sears with the Regional Director in Seattle, Wash. The refusal was based upon an Advice Memorandum and involved a judgment about the timeliness of the withdrawal by Sears from a multi-employer bargaining unit: the letter sent by the Regional Director to Sears to explain the refusal stated that Sears' withdrawal had been untimely. Sears' appeal—without the benefit of the documents sought—was ultimately successful, a complaint was filed with the Board, and hearings were scheduled to commence on the complaint on November 9, 1971. Proceedings before the Board were delayed for a time by a stay issued by the District Court, later reversed by the Court of Appeals, *Sears, Roebuck & Co.* v. *NLRB*, 153 U. S. App. D. C. 380, 473 F. 2d 91 (1973), cert. denied, 415 U. S. 950 (1974); and the complaint was eventually withdrawn upon withdrawal of the underlying charge.

Sears' rights under the Act are neither increased nor decreased by reason of the fact that it claims an interest in the Advice and Appeals Memoranda greater than that shared by the average member of the public. The Act is fundamentally designed to inform the public about agency action and not to benefit private litigants. *EPA* v. *Mink*, 410 U. S. 73, 79, 92 (1973); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974). Accordingly, we will not refer again to Sears' underlying unfair labor practice charge.

disclosure under 5 U. S. C. § 552 (b)(5) as "intra-agency memoranda" which reflect the thought processes of the General Counsel's staff; and that they are exempt pursuant to 5 U. S. C. § 552 (b)(7) as part of the "investigative process." The letter said that Appeals Memoranda were not indexed by subject matter and, therefore, the General Counsel was "unable" to comply with Sears' request. In further explanation of his decision, with respect to Appeals Memoranda, the General Counsel wrote to Sears on August 4, 1971, and stated that Appeals Memoranda which ordered the filing of a complaint were not "final opinions." [11] The letter further stated that those Appeals Memoranda which *were* "final opinions, i. e., those in which an appeal was denied" and which directed that no complaint be filed, numbered several thousand, and that in the General Counsel's view they had no precedential significance. Accordingly, if disclosable at all, they were disclosable under 5 U. S. C. § 552 (a)(3) relating to "identifiable records." The General Counsel then said that Sears had failed adequately to identify the material sought and that he could not justify the expenditure of time necessary for the agency to identify them.

On August 4, 1971, Sears filed a complaint pursuant to the Act seeking a declaration that the General Counsel's refusal to disclose the Advice and Appeals Memoranda and indices thereof requested by Sears violated the Act, and an injunction enjoining continued violations of the Act. On August 24, 1971, the current General Counsel took office. In order to give him time to develop his own disclosure policy, the filing of his answer was postponed until February 3, 1972. The answer denied that the Act

[11] The reference was apparently to the provisions of 5 U. S. C. § 552 (a)(2)(A) specifically providing for disclosure and indexing of final opinions.

required disclosure of any of the documents sought but referred to a letter of the same date in which the General Counsel informed Sears that he would make available the index to Advice Memoranda and also all Advice and Appeals Memoranda in cases which had been closed—either because litigation before the Board had been completed or because a decision not to file a complaint had become final. He stated, however, that he would not disclose the memoranda in open cases; that he would, in any event, delete names of witnesses and "security sensitive" matter from the memoranda he did disclose; and that he did not consider the General Counsel's Office bound to pursue this new policy "in all instances" in the future.

Not wholly satisfied with the voluntary disclosures offered and made by the General Counsel, Sears moved for summary judgment and the General Counsel did likewise. Sears thus continued to seek memoranda in open cases. Moreover, Sears objected to the deletions in the memoranda in closed cases and asserted that many Appeals Memoranda were unintelligible because they incorporated by reference documents which were not themselves disclosed and also referred to "the 'circumstances of the case' " which were not set out and about which Sears was ignorant. The General Counsel contended that all of the documents were exempt from disclosure as "intra-agency" memoranda within the coverage of 5 U. S. C. § 552 (b)(5); and that the documents incorporated by reference were exempt from disclosure as "investigatory files" pursuant to 5 U. S. C. § 552 (b)(7). The parties also did not agree as to the function of an Advice Memorandum. Sears claimed that Advice Memoranda are binding on Regional Directors. The General Counsel claimed that they are not, noting the fact that the Regional Director himself has the delegated power to issue a complaint.

The District Court granted Sears' motion for summary judgment and denied that of the General Counsel. The court found that, although the General Counsel had delegated to the Regional Directors the power to file complaints, an Advice Memorandum constituted a *pro tanto* withdrawal of the delegation of that power. Accordingly, Advice Memoranda were held to constitute "instructions to staff that affect a member of the public," which are expressly disclosable pursuant to 5 U. S. C. § 552 (a)(2)(C). Appeals Memoranda were held to be "final opinions." Both were held not to be "intra-agency memorandums" protected by 5 U. S. C. § 552 (b)(5), since they were not expressions "of a point of view" but the "disposition of a charge." Documents incorporated by reference in the memoranda were held to have lost whatever exempt status they had previously. See *American Mail Line, Ltd.* v. *Gulick,* 133 U. S. App. D. C. 382, 389, 411 F. 2d 696, 703 (1969). The court then concluded that the case was a proper one for exercise of its injunctive powers under the Act, even though the General Counsel had voluntarily disclosed some of the material sought. The court noted that it had jurisdiction to enjoin the withholding of documents prospectively, in addition to ordering the production of documents already withheld. It referred to the fact that the General Counsel's Office had a longstanding policy of nondisclosure and that it still maintained that the policy was lawful and that the current one of partial disclosure could be changed, and it referred to the fact that disputes had arisen about the deletions in the documents which had been disclosed voluntarily. Accordingly, the court ordered that the General Counsel (1) make available to the public all Appeals and Advice Memoranda issued since July 4,

1967,[12] and any document expressly incorporated by reference (without apparently limiting the order to memoranda on the subject matter requested by Sears); [13] (2) produce, and compile if necessary, indices of the memoranda; (3) produce explanatory material, including existing documents, in those instances in which a memorandum refers to the "circumstances of the case"; and (4) cease deleting names, citations, or matter other than settlement suggestions, from the memoranda without written justification.[14] This decision was affirmed without opinion by the Court of Appeals for the District of Columbia Circuit on the basis of its decision in *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 157 U. S. App. D. C. 121, 482 F. 2d 710 (1973), rev'd, *post,* p. 168, and we granted certiorari, 417 U. S. 907 (1974), in both cases and set them for argument together to consider the important questions of the construction of the Act as they relate to documents generated by agency decisionmaking processes.

III

It is clear, and the General Counsel concedes, that Appeals and Advice Memoranda are at the least "identifiable records" which must be disclosed on demand, unless they fall within one of the Act's exempt categories.[15] It is also clear that, if the memoranda do fall within one of the Act's exempt categories, our inquiry is

[12] The effective date of the Act.

[13] The parties make no issue of the breadth of this order and we assume that it was intended to apply only to the Appeals and Advice Memoranda dealing with the subject matter described in Sears' complaint.

[14] See 5 U. S. C. § 552 (a) (2).

[15] The General Counsel has abandoned the contrary contention which his predecessor made in connection with Appeals Memoranda in his August 4 letter to Sears.

at an end, for the Act "does not apply" to such documents. Thus our inquiry, strictly speaking, must be into the scope of the exemptions which the General Counsel claims to be applicable—principally Exemption 5 relating to "intra-agency memorandums." The General Counsel also concedes, however, and we hold for the reasons set forth below, that Exemption 5 does not apply to any document which falls within the meaning of the phrase "final opinion . . . made in the adjudication of cases." 5 U. S. C. § 552 (a)(2)(A). The General Counsel argues, therefore, as he must, that no Advice or Appeals Memorandum is a final opinion made in the adjudication of a case and that all are "intra-agency" memoranda within the coverage of Exemption 5. He bases this argument in large measure on what he claims to be his lack of adjudicative authority. It is true that the General Counsel lacks any authority finally to adjudicate an unfair labor practice claim in favor of the claimant; but he does possess the authority to adjudicate such a claim against the claimant through his power to decline to file a complaint with the Board. We hold for reasons more fully set forth below that those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are "final opinions" made in the adjudication of a case and fall outside the scope of Exemption 5; but that those Advice and Appeals Memoranda which explain decisions by the General Counsel to file a complaint and commence litigation before the Board are not "final opinions" made in the adjudication of a case and do fall within the scope of Exemption 5.

A

The parties are in apparent agreement that Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency. *EPA* v. *Mink*, 410 U. S., at 85–86. Since

virtually any document not privileged may be discovered by the appropriate litigant, if it is relevant to his litigation, and since the Act clearly intended to give any member of the public as much right to disclosure as one with a special interest therein, *id.*, at 79, 92; *Sterling Drug, Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 243, 244, 450 F. 2d 698, 704, 705 (1971); S. Rep. No. 813, p. 5; H. R. Rep. No. 1497, p. 1, it is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.[16] The privileges claimed by petitioners to be relevant to this case are (i) the "generally . . . recognized" privilege for "confidential intra-agency advisory opinions . . . ," *Kaiser Aluminum & Chemical Corp.* v. *United States*, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.), disclosure of which "would be 'injurious to the consultative functions of government . . . .' *Kaiser Aluminum & Chemical Corp., supra*, at 49, 157 F. Supp., at 946," *EPA* v. *Mink, supra*, at 86–87 (sometimes referred to as "executive privilege"), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants.

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[16] The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case; or on the nature of the case. *EPA* v. *Mink*, 410 U. S., at 86 n. 13; *Hickman* v. *Taylor*, 329 U. S. 495, 511–512 (1947); *Jencks* v. *United States*, 353 U. S. 657 (1957); *United States* v. *Nixon*, 418 U. S. 683 (1974). However, it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling. Indeed, the House Report says that Exemption 5 was intended to permit disclosure of those intra-agency memoranda which would "routinely be disclosed" in private litigation, H. R. Rep. No. 1497, p. 10, and we accept this as the law. *Sterling Drug, Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 243–244, 450 F. 2d 698, 704–705 (1971).

(i)

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear, S. Rep. No. 813, p. 9; H. R. Rep. No. 1497, p. 10; *EPA* v. *Mink, supra,* at 86. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of government agencies," *Tennessean Newspapers, Inc.* v. *FHA,* 464 F. 2d 657, 660 (CA6 1972); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F. R. D. 318 (DC 1966); see also *EPA* v. *Mink, supra,* at 86–87; *International Paper Co.* v. *FPC,* 438 F. 2d 1349, 1358–1359 (CA2 1971); *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* at 49, 157 F. Supp., at 946; and focus on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena, supra,* at 324. The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. S. Rep. No. 813, p. 9. See also H. R. Rep. No. 1497, p. 10; *EPA* v. *Mink, supra,* at 87. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," *Ackerly* v. *Ley,* 137 U. S. App. D. C. 133, 138, 420 F. 2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the

detriment of the decisionmaking process." United States v. *Nixon,* 418 U. S. 683, 705 (1974) (emphasis added).[17]

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged,[18] *e. g., Boeing Airplane Co.* v. *Coggeshall,* 108 U. S. App. D. C. 106, 280 F. 2d 654 (1960); *O'Keefe* v. *Boeing Co.,* 38 F. R. D. 329 (SDNY 1965); *Walled Lake Door Co.* v. *United States,* 31 F. R. D. 258 (ED Mich. 1962); *Zacher* v. *United States,* 227 F. 2d 219, 226 (CA8 1955), cert. denied, 350 U. S. 993 (1956); *Clark* v. *Pear-*

[17] Our remarks in *United States* v. *Nixon* were made in the context of a claim of "executive privilege" resting solely on the Constitution of the United States. No such claim is made here and we do not mean to intimate that any documents involved here are protected by whatever constitutional content the doctrine of executive privilege might have.

[18] Our emphasis on the need to protect pre-*decisional* documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

son, 238 F. Supp. 495, 496 (DC 1965); and communications made after the decision and designed to explain it, which are not.[19] *Sterling Drug, Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 450 F. 2d 698 (1971); *GSA* v. *Benson*, 415 F. 2d 878, 881 (CA9 1969); *Bannercraft Clothing Co.* v. *Renegotiation Board*, 151 U. S. App. D. C. 174, 466 F. 2d 345 (1972), rev'd on other grounds, 415 U. S. 1 (1974); *Tennessean Newspapers, Inc.* v. *FHA*, *supra*. See also S. Rep. No. 1219, 88th Cong., 2d Sess., 7 and 11.[20] This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of postdecisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed

[19] We are aware that the line between predecisional documents and postdecisional documents may not always be a bright one. Indeed, even the prototype of the postdecisional document—the "final opinion"—serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases arising in the future. In its latter function, the opinion is predecisional; and the manner in which it is written may, therefore, affect decisions in later cases. For present purposes it is sufficient to note that final opinions are *primarily* postdecisional—looking back on and explaining, as they do, a decision already reached or a policy already adopted—and that their disclosure poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions.

[20] This report was prepared in connection with a Senate bill identical to the one which led to the Act, which was eventually passed by the 89th Congress.

within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5. *Bannercraft Clothing Co.* v. *Renegotiation Board,* 151 U. S. App. D. C., at 181, 466 F. 2d, at 352; *Cuneo* v. *Schlesinger,* 157 U. S. App. D. C. 368, 484 F. 2d 1086 (1973), cert. denied *sub nom. Rosen* v. *Vaughn,* 415 U. S. 977 (1974); *Ash Grove Cement Co.* v. *FTC,* 371 F. Supp. 370 (1973), aff'd in part and rev'd in part, 167 U. S. App. D. C. 249, 511 F. 2d 815 (1975). Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967); Note, Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv. L. Rev. 1047 (1973).

This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions," "statements of policy and interpretations which have been adopted by the agency," and "instructions to staff that affect a member of the public," 5 U. S. C. § 552 (a) (2), represents a strong congressional aversion to "secret [agency] law," Davis, *supra,* at 797; and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." H. R. Rep. No. 1497, p. 7. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U. S. C. § 552 (a)(2); and with respect at least to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final disposi-

tions" of matters by an agency, see *infra*, at 158–159, we hold that Exemption 5 can never apply.[21]

(ii)

It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. The Senate Report states that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties," S. Rep. No. 813, p. 2; and the case law clearly makes the attorney's work-product rule of *Hickman* v. *Taylor*, 329 U. S. 495 (1947), applicable to Government attorneys in litigation. *Kaiser Aluminum & Chemical Corp.* v. *United States*, 141 Ct. Cl., at 50, 157 F. Supp, at 947; *United States* v. *Anderson*, 34 F. R. D. 518 (Colo. 1963); *Thill Securities Corp.* v. *New York Stock Exchange*, 57 F. R. D. 133 (ED Wis. 1972); *J. H. Rutter Rex Mfg. Co., Inc.* v. *NLRB*, 473 F. 2d 223 (CA5), cert. denied, 414 U. S. 822 (1973). Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy. *In re Natta*, 410 F. 2d 187 (CA3), cert. denied *sub nom. Montecatini Edison* v. *E. I. du Pont de Nemours & Co.*, 396 U. S. 836 (1969); *State ex rel. Dudek* v. *Circuit Court for Mil-*

[21] See Note, 86 Harv. L. Rev. 1047 (1973). Technically, of course, if a document could be, for example, both a "final opinion" and an intra-agency memorandum within Exemption 5, it would be non-disclosable, since the Act "does not apply" to documents falling within any of the exemptions.

waukee County, 34 Wis. 2d 559, 150 N. W. 2d 387 (1967); *Hickman* v. *Taylor*, *supra*, at 510–511.

B

Applying these principles to the memoranda sought by Sears, it becomes clear that Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party; but that Exemption 5 does protect from disclosure those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the Board.

(i)

Under the procedures employed by the General Counsel, Advice and Appeals Memoranda are communicated to the Regional Director *after* the General Counsel, through his Advice and Appeals Branches, has decided whether or not to issue a complaint; and represent an explanation to the Regional Director of a legal or policy decision already adopted by the General Counsel. In the case of decisions *not* to file a complaint, the memoranda effect as "final" a "disposition," see discussion, *infra*, at 158–159, as an administrative decision can—representing, as it does, an unreviewable rejection of the charge filed by the private party. *Vaca* v. *Sipes*, 386 U. S. 171 (1967). Disclosure of these memoranda would not intrude on predecisional processes, and protecting them would not improve the quality of agency decisions, since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make—he is bound to dismiss the charge. Moreover, the General Counsel's decisions not to file complaints together with the Advice

and Appeals Memoranda explaining them, are precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret.[22] The Committee on Practice and Procedure of the American Bar Association's Section of Labor Relations Law (ABA Committee) has said in its 1970 report:

> "Where the Advice Branch directs the Regional Director to issue a complaint, or where a Regional Director's dismissal is reversed on appeal and a complaint is subsequently issued, the subject matter, theory, and interpretation will ultimately be ventilated through the course of hearing, Trial Examiner and Board decisions, and perhaps review and adjudication in the courts. It is in all the remaining cases,

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[22] The General Counsel argues that he makes no law, analogizing his authority to decide whether or not to file a complaint to a public prosecutor's authority to decide whether a criminal case should be brought, and claims that he does not adjudicate anything resembling a civil dispute. Without deciding whether a public prosecutor makes "law" when he decides not to prosecute or whether memoranda explaining such decisions are "final opinions," see *infra*, at 158, and n. 25, it is sufficient to note that the General Counsel's analogy is far from perfect. The General Counsel, unlike most prosecutors, may authorize the filing of a complaint with the Board only if a private citizen files a "charge." 29 U. S. C. §§ 153 (d) and 160 (b); 29 CFR § 101.2; *Auto Workers* v. *Scofield*, 382 U. S. 205, 219 (1965); *NLRB* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18 (1943). Unlike the victim of a crime, the charging party will, if a complaint is filed by the General Counsel, become a party to the unfair labor practice proceeding before the Board. 29 CFR § 102.8; *Auto Workers* v. *Scofield*, *supra*, at 219. And, if an unfair labor practice is found to exist, the ensuing cease-and-desist order will, unlike the punishment of the defendant in a criminal case, coerce conduct by the wrongdoer flowing particularly to the benefit of the charging party. For these reasons, we have declined to characterize the enforcement of the laws against unfair labor practices either as a wholly public or wholly private matter. *Id.*, at 218–219.

> however, where the General Counsel either through the Advice Branch or through the Office of Appeals determines that issuance of complaint *is not warranted*, and that such determination constitutes final agency action of precedential import. . . . Your Committee believes that these 'precedents' constitute precisely the kinds of 'final opinions, statements of policy and interpretations' and 'instructions to staff that affect a member of the public,' which the Freedom of Information Act contemplates should be indexed and made available to the public." 2 ABA Labor Relations Law Section, p. 7 (1970).

The General Counsel contends, however, that the Appeals Memoranda represent only the first step in litigation and are not final; and that Advice Memoranda are advisory only and not binding on the Regional Director, who has the discretion to file or not to file a complaint. The contentions are without merit. Plainly, an Appeals Memorandum is the first step in litigation only when the appeal is sustained and it directs the filing of a complaint; [23] and the General Counsel's current characterization of an Advice Memorandum is at odds with his own description of the function of an Advice Memorandum in his statement to the House Committee. That statement says that the Advice Branch establishes "*uniform* policies" in those legal areas with respect to which Regional Directors are "required" to seek advice until a "definitive" policy is arrived at. This is so because if Regional Directors were "free" to interpret legal issues "the *law* could, as a practical matter and before Board decision of the issue, be one thing in one Region and conflicting in others." Statement 3075, 3076, 3077. (Em-

[23] The General Counsel himself in his letter to Sears of August 4, 1971, referred to the Appeals Memoranda "in which an appeal was denied" as "final opinions."

phasis added.) Therefore, the Advice Memorandum is created after consideration of "prior advice determinations in similar or related cases" and contains "instructions for the final processing of the case." *Id.*, at 3076. In light of this description, we cannot fault the District Court for concluding that the Advice Memorandum achieves a *pro tanto* withdrawal from the Regional Director of his discretion to file or not to file a complaint. Nor can we avoid the conclusion that Advice Memoranda directing dismissal of a charge represent the "law" of the agency. Accordingly, Advice and Appeals Memoranda directing that a charge be dismissed fall outside of Exemption 5 and must be disclosed.[24]

For essentially the same reasons, these memoranda are "final opinions" made in the "adjudication of cases" which must be indexed pursuant to 5 U. S. C. § 552 (a)(2)(A). The decision to dismiss a charge is a decision in a "case" and constitutes an "adjudication": an "adjudication" is defined under the Administrative Procedure Act, of which 5 U. S. C. § 552 is a part, as "agency process for the formulation of an order," 5 U. S. C. § 551 (7); an "order" is defined as "the whole or a part of a *final disposition*, whether affirmative [or] negative . . . of an agency in a matter . . . ," 5 U. S. C. § 551 (6) (emphasis added); and the dismissal of a charge, as noted above, is a "final disposition." [25] Since an Advice or Appeals Memoran-

[24] *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600 (CA5 1966), relied on heavily by the General Counsel, is not to the contrary. In that case, Advice Memoranda were held to be privileged in the civil discovery context. However, a reading of the case discloses that the Advice Memoranda there involved had been issued in cases that later came before the Board, and it may therefore be inferred that these memoranda did not direct dismissal of the charge, but directed the filing of a complaint.

[25] We note that the possibility that the decision reached in an Advice Memorandum may be overturned in an Appeals Memorandum, as happened in the case involving Sears, discussed in n. 10, *supra*,

dum explains the reasons for the "final disposition" it plainly qualifies as an "opinion"; and falls within 5 U. S. C. § 552 (a)(2)(A). This conclusion is consistent with our recent holding in *ITT* v. *Electrical Workers*, 419 U. S. 428 (1975), that Board decisions in proceedings under 29 U. S. C. § 160 (k) (§ 10 (k) proceedings) are not "final dispositions." The decision in the § 10 (k) proceeding in that case did not finally decide anything and is more analogous to a decision by the General Counsel that an unfair labor practice complaint *should* be filed. See *infra*, this page and 160.

(ii)

Advice and Appeals Memoranda which direct the filing of a complaint, on the other hand, fall within the coverage of Exemption 5. The filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case. The case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board. The Memoranda will inexorably contain the General Counsel's theory of

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does not affect its finality for our purposes. The decision reached in the Advice Memorandum, in the absence of an appeal filed by the charging party, has real operative effect, as much as does every order issued by a United States district court which might, if appealed, be overturned by a United States court of appeals. (Indeed, since the General Counsel is ultimately responsible for both the Advice and the Appeals Memoranda, an appeal in a case in which an Advice Memorandum is prepared is more like a petition for rehearing than it is like a normal appeal and the probability that the result will change is slim.) The Advice Memorandum is therefore unlike both the advisory opinion involved in *ITT* v. *Electrical Workers*, 419 U. S. 428 (1975), and the Regional Board Reports—which can have no operative effect at all until reviewed by the Statutory Board—in the companion case of *Renegotiation Board* v. *Grumman Aircraft*, *post*, p. 168.

the case and may communicate to the Regional Director some litigation strategy or settlement advice. Since the Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product. At the same time, the public's interest in disclosure is substantially reduced by the fact, as pointed out by the ABA Committee, see *supra*, at 156, that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the "law" with respect to these cases will ultimately be made not by the General Counsel but by the Board or the courts.

We recognize that an Advice or Appeals Memorandum directing the filing of a complaint—although representing only a decision that a legal issue is sufficiently in doubt to warrant determination by another body—has many of the characteristics of the documents described in 5 U. S. C. § 552 (a)(2). Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum does explain a decision already reached by the General Counsel which has real operative effect—it permits litigation before the Board; and we have indicated a reluctance to construe Exemption 5 to protect such documents. *Supra*, at 153. We do so in this case only because the decisionmaker—the General Counsel—must become a litigating party to the case with respect to which he has made his decision. The attorney's work-product policies which Congress clearly incorporated into Exemption 5 thus come into play and lead us to hold that the Advice and Appeals Memoranda directing the filing of a complaint are exempt whether or not they are, as the District Court held, "instructions to staff that affect a member of the public." [26]

[26] It is unnecessary, therefore, to decide whether petitioners are correct in asserting that, properly construed, "instructions to staff"

C

Petitioners assert that the District Court erred in holding that documents incorporated by reference in non-exempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda.[27] We disagree.

The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, *if adopted*, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes *its* responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below. Thus, we hold that, if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Petitioners also assert that the District Court's order erroneously requires it to produce or create explanatory material in those instances in which an Appeals Memorandum refers to the "circumstances of the case." We agree. The Act does not compel agencies to write

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do not in any event include documents prepared in furtherance of the "prosecution" of a specific case.

[27] It should be noted that the documents incorporated by reference are in the main factual documents which are probably not entitled to Exemption 5 treatment in the first place. *EPA* v. *Mink*, 410 U. S., at 87–93.

opinions in cases in which they would not otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. *Sterling Drug, Inc.* v. *FTC*, 146 U. S. App. D. C. 237, 450 F. 2d 698 (1971). Thus, insofar as the order of the court below requires the agency to create explanatory material, it is baseless. Nor is the agency required to identify, after the fact, those pre-existing documents which contain the "circumstances of the case" to which the opinion may have referred, and which are not identified by the party seeking disclosure.

IV

Finally, petitioners argue that the Advice and Appeals Memoranda are exempt, pursuant to 5 U. S. C. §§ 552 (b)(2) and (7) (Exemptions 2 and 7), and that the documents incorporated therein are protected by Exemption 7. With respect to the Advice and Appeals Memoranda, we decline to reach a decision on these claims for the reasons set forth below, and with respect to the documents incorporated therein, we remand for further proceedings.

A

Exemption 7 provided, at the time of Sears' request for documents and at the time of the decisions of the courts below, that the Act does not apply to "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Noting support in the legislative history for the proposition that this exemption applies to the civil "enforcement" of the labor laws, H. R. Rep. No. 1497, p. 11, the General Counsel asserts that the "documentation underlying advice and appeals memoranda are 'investigatory files' " and that he "believes" the memoranda are themselves simi-

larly exempt in light of the "purposes" [28] of Exemption 7. The General Counsel also cites several lower court decisions [29] for the proposition that once a certain *type* of document is determined to fall into the category of "investigatory files" the courts are not to inquire whether the disclosure of the *particular* document in question would contravene any of the purposes of Exemption 7.

Two factors combine to convince us that we should not reach the claim that Advice and Appeals Memoranda are protected by Exemption 7. First, the General Counsel did not make this claim in the District Court; and although he did make it in the Court of Appeals, that court affirmed without opinion on the basis of its prior decision in another case not involving Exemption 7, and it is not clear whether the Court of Appeals passed on the claim. Thus, not only are we unenlightened on the question whether Advice and Appeals Memoranda, as factual matter, contain information the disclosure of which would offend the purposes of Exemption 7, but we are

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[28] The "purposes" would appear to be "to prevent the premature disclosure of the results of an investigation so that the Government can present its strongest case in court, and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information." *Frankel* v. *SEC*, 460 F. 2d 813, 817 (CA2), cert. denied, 409 U. S. 889 (1972). The first purpose is plainly inapplicable to cases in which the General Counsel has declined to commence a case; and the General Counsel never tells us whether its "procedures" or its "information" sources are revealed in Advice or Appeals Memoranda.

[29] *Weisberg* v. *Department of Justice*, 160 U. S. App. D. C. 71, 78–79, 489 F. 2d 1195, 1202–1203 (1973) (en banc), cert. denied, 416 U. S. 993 (1974). Accord: *Center for National Policy Review* v. *Weinberger*, 163 U. S. App. D. C. 368, 502 F. 2d 370 (1974); *Rural Housing Alliance* v. *Department of Agriculture*, 162 U. S. App. D. C. 122, 498 F. 2d 73 (1974); *Ditlow* v. *Brinegar*, 161 U. S. App. D. C. 154, 155, 494 F. 2d 1073, 1074, cert. denied, 419 U. S. 974 (1974); *Aspin* v. *Department of Defense*, 160 U. S. App. D. C. 231, 237, 491 F. 2d 24, 30 (1973).

without a lower court opinion on the legal issue. Under such circumstances, we normally decline to consider a legal claim, *Ramsey* v. *Mine Workers,* 401 U. S. 302 (1971); *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144 (1970), and we adhere to that policy in this case.

Second, Congress has amended Exemption 7 since petitioners filed their brief in this case. It now applies to

> "(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." Pub. L. 93–502, 88 Stat. 1563.

The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, see n. 29, *supra,* which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7. S. Conf. Rep. No. 93–1200 (1974). The language of the amended Exemption 7 and the legislative history underlying it clearly reveal a congressional intent to limit application of Exemption 7 to agency records so that it would apply only to the extent that "the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or

an impartial adjudication, constitute [an] . . . unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures." *Id.*, at 12.

Any decision of the Exemption 7 issue in this case would have to be under the Act, as amended, *Fusari* v. *Steinberg*, 419 U. S. 379, 387 (1975), and, apart from the General Counsel's failure to raise the issue, the lower courts have had no opportunity to pass on the applicability of the Act, as amended, to Advice and Appeals Memoranda, since the amendment occurred after the decision by the Court of Appeals.[30]

B

The General Counsel's claim that Advice and Appeals Memoranda are documents "related solely to the internal personnel rules and practices of an agency" and therefore protected by Exemption 2 was raised neither in the District Court nor in the Court of Appeals and we decline to reach it for the reasons set forth above.

C

Finally, the General Counsel claims that the documents, incorporated by reference in Advice and Appeals Memoranda, which were previously protected by Exemption 7, should not lose their exempt status by reason of

[30] Since the General Counsel failed in the District Court to assert a claim under the version of Exemption 7 which was, if anything, more favorable to his position than the current version, the Court of Appeals on remand should determine whether petitioners are foreclosed from further pursuing the issue. We note in addition, however, that a court of equity may always amend its decree on a proper showing, and the District Court may wish to do so, if the General Counsel demonstrates an injury to his functions of the type sought to be prevented in Exemption 7, resulting from the disclosure of a particular Advice or Appeals Memorandum.

incorporation. Contrary to the District Court, we think the argument is sound. The reasons underlying Congress' decision to protect "investigatory files," both in the original Act and in the amendments, are as applicable to a document referred to in an Advice or Appeals Memorandum as they are to a document which is not. Therefore, a document protected by Exemption 7 does not become disclosable solely because it is referred to in a "final opinion." We are aware that the result of this holding will be that some "final opinions" will not be as easily understood as they would otherwise be. However, as noted above, the Act does not give the public a right to intelligible opinions in all cases. It simply gives the public a right to those "final opinions," which an agency chooses to write, and to which the Act applies. Congress has said that the Act "does not apply" to certain investigatory files. The case must accordingly be remanded to the District Court for a determination whether the documents incorporated by reference in the disclosable Advice and Appeals Memoranda are protected by Exemption 7, as amended.

In summary, with respect to Advice and Appeals Memoranda which conclude that a complaint should not be filed, we affirm the judgment of the Court of Appeals subject to its decision on remand whether the Government is foreclosed from pursuing its Exemption 7 claim. With respect to documents specifically incorporated therein, we remand for a determination whether these documents are protected by Exemption 7, as amended. Insofar as the judgment of the Court of Appeals requires the General Counsel to supply documents not expressly incorporated by reference in these Advice and Appeals Memoranda, or otherwise to explain the circumstances of the case, it is reversed; and with respect to Advice and Appeals Memoranda which conclude that a complaint

should be filed, the judgment of the Court of Appeals is likewise reversed.

So ordered.

The CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

RENEGOTIATION BOARD *v.* GRUMMAN AIRCRAFT ENGINEERING CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1316. Argued January 14, 1975—Decided April 28, 1975

Pursuant to the Government contract renegotiation process in effect under the Renegotiation Act of 1951 for so-called Class A cases (those in which the contractor reported profits of more than $800,000 on the relevant contracts) during the period involved in this case, if the Regional Board made a recommendation as to the amount of excessive profits in the year in issue rather than recommending a clearance, *i. e.*, a unilateral determination that a contractor realized no excessive profits during the year in issue, the case, if the contractor declined to enter into an agreement, would be reassigned to the Renegotiation Board (Board). The case file, including the Regional Board Report, was then transmitted to the Board and assigned to a division of the Board, usually consisting of three of its five members, which in due course would make its own decision and submit to the full Board a Division Report, including a recommendation for final disposition of the case. If the Regional Board concluded that no excessive profits had been realized and that a clearance should therefore issue, a "final recommendation" that a clearance be issued was sent to the Board, which considered the case on the basis of the Regional Board Report. Respondent brought an action pursuant to the Freedom of Information Act (FOIA), 5 U. S. C. § 552, seeking disclosure of certain Regional Board Reports resulting in a recommendation of clearance and Board approval, and of Division Reports in other cases, all related to and issued during renegotiation proceedings involving 14 other companies during the period 1962–1965. The District Court ultimately granted relief on the grounds that both the Regional Board and Division Reports were "final opinions" within the meaning of § 552 (a) (2) (A), which requires a Government agency to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," and were not exempt from disclosure under § 552 (b) (5) (Exemp-

tion 5) as "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." The Court of Appeals affirmed, further holding that even if the Regional Board Reports were not "final opinions" of *the Board*, they were disclosable as final opinions of the Regional Board, which was to be considered an "agency" for purposes of the FOIA. *Held:* Neither the Regional Board nor Division Reports are final opinions and they do fall within Exemption 5, since (1) only the full Board has the power by law to make the decision whether excessive profits exist; (2) both types of reports are prepared prior to that decision and are used by the Board in its deliberations; and (3) the evidence fails to support the conclusion that the reasoning in the reports is adopted by the Board as *its* reasoning, even when it agrees with a report's conclusion. Pp. 183–190.

(a) The Regional Board Reports, being prepared long before the Board reached its decision and being used by it as a basis for discussion, are precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Regardless of whether the Regional Boards are agencies for Class A purposes so that their final recommendations are *inter*-agency memoranda, or are not agencies separate from the Board so that their recommendations are *intra*-agency memoranda, the Regional Boards' total lack of decisional authority brings their reports within Exemption 5 and prevents them from being "final opinions." Pp. 185–188.

(b) Since the Division Reports were prepared before the Board reached its decision and to assist it in its deliberations, and were used by the full Board as a basis for discussion, the Board should not be deprived of such a thoroughly uninhibited version of this valuable deliberative tool by making such reports public on the unsupported assumption that they always disclose the final views of at least some Board members. Pp. 189–190.

157 U. S. App. D. C. 121, 482 F. 2d 710, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., dissented. POWELL, J., took no part in the consideration or decision of the case.

Allan Abbot Tuttle argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Hills, Leonard Schaitman,* and *David M. Cohen.*

Tom M. Schaumberg argued the cause for respondent. With him on the brief was *Frederick B. Abramson.**

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether certain documents—documents generated by the Renegotiation Board (Board) and by its Regional Boards in performing their task of deciding whether certain Government contractors have earned, and must refund, "excessive profits" on their Government contracts—are "final opinions" explaining the reasons for agency decisions already made, and thus expressly subject to disclosure pursuant to the Freedom of Information Act (Act), 5 U. S. C. § 552 (a)(2)(A), or are instead predecisional consultative memoranda exempted from disclosure by § 552 (b)(5). See *NLRB* v. *Sears, Roebuck & Co., ante,* p. 132.

I

Essential to the consideration of whether the documents at issue in this case must be disclosed pursuant to the relevant provisions of the Act is an understanding of the renegotiation process, a process that itself serves to define the documents in issue and hereinafter described.[1]

**Melvin L. Wulf, Carol A. Cowgill,* and *Marvin M. Karpatkin* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] See generally S. Rep. No. 93-927, pp. 1-2 (1974); Staff Review of Recommendations Made on the Renegotiation Process: A Preliminary Report 3-5 (1974) (prepared for the use of the House Committee on Ways and Means and the Senate Committee on Finance by the staff of the Joint Committee on Internal Revenue Taxation (hereinafter Staff Review)).

Under the Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U. S. C. App. § 1211 *et seq.*, the Government is entitled to recoup from those who hold contracts or subcontracts with certain departments of the Government any "excessive profits" received by such persons on such contracts. The amount of the profits which will be considered "excessive" in connection with a particular contract depends upon the statutory factors which are set forth in the margin.[2] As the Board's name suggests, it

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[2] Title 50 U. S. C. App. § 1213 (e) reads as follows:

"(e) The term 'excessive profits' means the portion of the profits derived from contracts with the Departments and subcontracts which is determined in accordance with this title [§§ 1211 to 1224 of this Appendix] to be excessive. In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

"(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

"(2) The net worth, with particular regard to the amount and source of public and private capital employed;

"(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

"(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

"(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

"(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted."

These statutory "factors" were developed by the War Contracts Price Adjustment Board during World War II, were incorporated by Con-

endeavors to, and in fact does, conclude the vast majority of its cases by agreement. 50 U. S. C. App. § 1215 (a) (1970 ed., Supp. I). Absent an agreement, however, the Board must decide either to issue a "clearance," *i. e.*, a unilateral determination that the contractor realized no excessive profits during the year in issue, or to issue a unilateral order fixing excessive profits at a specified amount and directing the contractor to refund them. The unilateral order is final unless a *de novo* determination regarding excessive profits is sought within 90 days before the Court of Claims.[3] It is in those cases not terminated by agreement that the documents at issue in this case were generated.[4] With this in mind, we turn to the details of the renegotiation process as it existed during the period relevant to the decision in this case.[5]

Persons holding contracts or subcontracts with certain departments of the Government were required to file financial statements as prescribed by the Board, 50 U. S. C. App. § 1215 (e)(1) (1964 ed.); 32 CFR Part 1470, if their receipts from those contracts met the requisite jurisdictional amount, 50 U. S. C. App. § 1215 (f). These state-

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gress into the original Renegotiation and Revenue Acts of that era, were continued in the Renegotiation Act of 1951, and have undergone little change since their initial development. Staff Review, *supra*, n. 1, at 23, and nn. 34–36.

[3] Prior to July 1971, *de novo* review was by the Tax Court. See 85 Stat. 98.

[4] Through June 30, 1970, 3,524 out of 4,006 cases not resulting in clearances terminated by agreement. Of the remaining 482 cases, the Board's unilateral orders were challenged in court in 203 cases.

[5] The description of the renegotiation process is of the process existing between 1962 through 1965—the period in which the documents relevant to this case were generated within the Board—notwithstanding changes made since. Unless otherwise indicated, all citations to the Code of Federal Regulations throughout this opinion are to the Renegotiation Board's regulations in effect during this period (*i. e.*, the Code as revised January 1, 1967).

ments were reviewed by the staff of the Board, and, if that initial review indicated the possibility that the contractor realized "excessive" profits, the "case" was referred to one of two Regional Boards for further action.[6] At the time of this assignment, each case was designated as a Class A case or a Class B case: the former if the contractor had reported profits of more than $800,000 on the relevant contracts covered in his financial statement, and the latter in all other cases.[7] The principal difference between Class A cases and Class B cases was that the Regional Boards had some final decisional authority in the latter and none in the former. 32 CFR §§ 1471.2 (b), 1473.2 (a), 1474.3 (a), and 1475.3 (a). Since the documents sought by respondent in this case were all generated in Class A cases, only the procedure applicable to those cases will be discussed.

After reference to a Regional Board, a case was usually assigned to a staff team consisting of an accountant and a renegotiator.[8] This team, after determining what further information from the contractor was required, secured such information and received any sub-

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[6] The reference is normally made on the basis of geographical considerations, 32 CFR § 1471.2 (a). These Regional Boards were established in 1952 by regulation, 32 CFR § 1451.32, pursuant to statutory authorization, 50 U. S. C. App. § 1217 (d). Unlike members of the Board, who are appointed to the Board by the President, Regional Board members are civil servants.

[7] Under certain circumstances, cases may be redesignated after their initial designation. 32 CFR § 1471.2 (f).

[8] During the years 1962–1965, a renegotiator might be a staff member employed by the Regional Board or a member of the Regional Board itself. Under the Board's current regulations, a member of the Regional Board who acts as a renegotiator in a specific case is thereafter barred from participation in the case as a member of the Regional Board. 32 CFR § 1472.3 (d) (1974). There was no comparable regulation in effect during the period relevant to this case.

missions the contractor might have wanted to make with regard to his case, including his position concerning the statutory factors that largely determined whether he had received "excessive profits," 50 U. S. C. App. § 1213 (e). A document entitled "Report of Renegotiation" was then prepared by the team. Part IA of that report, the accountant's section, contained pertinent financial and accounting data and was furnished to the contractor upon request.[9] Part II of the Report of Renegotiation, prepared by the renegotiator, and not furnished to the contractor, generally contained "an analysis and evaluation of the case; and a recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 CFR § 1472.3 (d). According to testimony given in this case, a Part II in outline form would be as follows:

"A. Sources of Information
"B. Application of Statutory Factors:
"1. Character of Business
"2. Capital Employed
"3. Extent of Risk Assumed
"4. Contribution to the Defense Effort
"5. Efficiency
"6. Reasonableness of Costs and Profiits
"(a) Costs
"(b) Pricing
"(c) Profits
"C. Special Matters
"D. Conclusion and Recommendation."

After a Report of Renegotiation was prepared, but

[9] 32 CFR § 1472.3 (d). Under 1972 amendments to the regulations, the Report of Renegotiation was discontinued and was replaced by other reports not relevant to this case. See generally 32 CFR §§ 1472.3 (e)–(g), and (i) (1974).

prior to its submission to the Regional Board, the team assigned to the case endeavored to meet with the contractor to resolve "any issues or disputed matters of fact, law or accounting." 32 CFR § 1472.3 (b). The report was then submitted to the Regional Board.

After reviewing the Report of Renegotiation and the case file, the Regional Board would make a "tentative recommendation with respect to the amount of excessive profits realized in the fiscal year under review." 32 CFR § 1472.3 (e).[10] This "tentative recommendation" could "be in an amount greater than, equal to, or less than the amount recommended in the Report of Renegotiation." *Ibid.* After a "tentative recommendation" was made, the contractor, unless he declined, attended a meeting with the renegotiation team at which he was informed of the tentative recommendation of the Regional Board, as well as the Regional Board's reasons therefor, and was afforded the opportunity to respond. The Regional Board would then enter a "final recommendation" either that a clearance be issued or that excessive profits be found in an amount greater than, equal to, or less than the tentative recommendation reached previously. If this final recommendation of the Regional Board corresponded to that of the staff team or panel, the report would be signed by the chairman of the Regional Board, signifying the approval of the staff or panel recommendation; if the Regional Board's final recommendation differed from the prior recommendation, an addendum would be attached to the report. The Report of Renegotiation with addenda, if any, will hereafter be referred to for convenience as the Regional Board Report.

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[10] Under current regulations, the Regional Board no longer makes this "tentative recommendation" in Class A cases, 32 CFR §§ 1472.3 (k) and (*l*) (1974).

(i)

Assuming the Regional Board did *not* recommend a clearance, it notified the contractor of its final recommendation in an effort to obtain an agreement. Toward this end, the contractor, upon request, would be furnished a "summary of the facts and reasons" (Summary) upon which the recommendation was based. 32 CFR § 1472.3 (i).[11] If a contractor did not request such a document, there is no indication that one was ever prepared in his case.

If the contractor declined to enter into an agreement, the case was then reassigned to the Board, to which the case file including the Regional Board Report was transmitted. The case was then assigned to a "division" of the Board, usually consisting of three of its five members, which would undertake a study of the case. Staff personnel would go over both Part IA and Part II of the Regional Board Report and indicate, in memoranda, their

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[11] This document was made available to the general public by regulation on February 24, 1971. 32 Fed Reg. 3808, 32 CFR § 1480.5 (a) (1972). When the Board first made the summaries of facts and reasons available to the public by regulation, it specifically stated that its action was taken "[w]ithout regard to the provisions of 5 U. S. C. [§] 552 (a) (2) . . . ." *Ibid.* Subsequent to the effective date of that regulation, the District Court in this case, notwithstanding the fact that the controversy over respondent's access to the summaries of facts and reasons sought in this action had apparently been mooted, held that these documents must be made available under the Act as "final opinions" of either the Board or the Regional Board, except in certain circumstances. 325 F. Supp. 1146, 1151–1152 (DC 1971). The Board has since amended its regulations, indicating that its own interpretation of the Act as to these documents is now consistent with that of the District Court. 32 CFR § 1480.5 (a) (1974). Under current Board regulations, the contractor automatically receives a document entitled "Proposed Opinion," if he has not indicated a willingness to enter into an agreement with the Board. 32 CFR § 1477.3 (a) (1974).

agreement or disagreement with the recommendation made by the Regional Board. At an appropriate juncture, the contractor would be afforded an opportunity to meet with the division members to discuss his case and submit additional relevant material. The division, in due course, would reach its own decision as to what recommendation should be made to the Board, "not . . . bound or limited in any manner by any evaluation, recommendation or determination of the Regional Board." 32 CFR § 1472.4 (b). The division would then submit to the full Board a report of the case, prepared by one of the members (Division Report), and including a recommendation for final disposition along with additional or contrary views, if any, of the other division members. The Division Report is one of the categories of documents sought by respondent under the Act.

The Board would then meet, each member having had the opportunity to study the case file and the report submitted on behalf of the division, discuss the case, and vote on a final disposition. Neither the Board nor any of its members were bound by any prior recommendations. The Board was free, after discussion, to reject the proposed conclusion reached in the Division Report, or to accept it for reasons other than those set forth in the report. 32 CFR § 1472.4 (d). Assuming the Board did not decide that a clearance should issue, the contractor was then notified of the Board's conclusion and would be given, at his request, a Summary to enable him to decide whether to enter into an agreement with the Board. If an agreement was not reached, the Board would then enter a *unilateral* order within a specified time, 32 CFR Part 1475, and would issue, pursuant to statute, at the request of the contractor, a "statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination." 50 U. S. C. App.

§ 1215 (a) (Statement).[12] Absent a contractor's request for a Statement, there is no indication that one was ever prepared in his case. For this type of case, the renegotiation process thus came to an end.[13]

(ii)

If the Regional Board concluded that no excessive profits had been realized by a particular contractor and that a clearance should therefore issue—or if the contractor agreed with the Regional Board as to an amount of excessive profits before the case was reassigned to the Board—then a Division Report was never created in that case. Instead, a "final recommendation" that a clearance be issued or that the agreement be consummated was sent to the Board, and the Board considered the case on the basis of the Regional Board Report, together with comments made by the Board's accounting and review divisions. After meeting and discussing the case on the basis of these documents, the Board decided whether to approve the Regional Board's conclusion. If it did, appropriate closing documents were prepared by the

[12] The "Summaries" and "Statements" were similar in both format and content. App. 35–41; 32 CFR § 1477.4. Under current Board regulations, the Regional Board now issues to the contractor a "Proposed Opinion," in lieu of the "summary of facts and reasons" discussed above, and furnishes to the contractor a "Regional Board Opinion" when the Regional Board's recommendation is forwarded to the Board. 32 CFR §§ 1477.3 (a) and (c) (1974). The Board also issues a "Final Opinion" in place of the Statement at the same time as it enters a unilateral order. 32 CFR § 1477.3 (b) (1974). All of these documents are available to the public. 32 CFR § 1480.5 (a) (1974).

[13] A dissatisfied contractor had the right at this point to bring an action in the Tax Court, which had jurisdiction to determine *de novo* whether excessive profits had been realized (see n. 3, *supra*); jurisdiction of these cases has subsequently been transferred to the Court of Claims. See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 15 and n. 14 (1974).

Regional Board. No explanation of the Board's reasons for agreeing with the Regional Board's recommendation was prepared or sent to the contractor; and it is not possible to know whether the Board agreed with the reasoning of the Regional Board Report or just its conclusion. If the conclusion of the Regional Board was *not* approved, the case was either returned to the Regional Board for further factfinding, or assigned to a division of the Board as though no recommendation agreeable to the contractor had ever been made. The Regional Board Reports in the category of cases in which clearances were recommended and approved by the Board—and therefore in which no Division Report was created—is the other type of document in issue in this case.

II

Against the foregoing backdrop, respondent filed a complaint, pursuant to the Act, in the District Court on June 27, 1968, seeking disclosure of "certain final opinions, orders and identifiable records" related to or issued during renegotiation proceedings involving 14 other companies during the period 1962–1965.[14] Respondent additionally sought certain documents related to its then-pending renegotiation proceedings before the Board for 1965, but later agreed that it was not seeking access to "[i]ntra-agency memoranda and communications consisting of ad-

[14] By reference in its complaint to correspondence between it and the Board of April 26, 1968, respondent requested access to "final opinions, determinations, unilateral orders, agreements, clearance notices and letters not to proceed issued in the adjudication of renegotiation cases" and "written summaries of the facts and reasons upon which such final opinions, determinations, unilateral orders and agreements have been reached." Nothing in the complaint or the letter suggests that, at that time, respondent sought the Regional Board Report, or the Division Report, in any of these renegotiation cases.

visory opinions, conclusions, recommendations, and analyses prepared by personnel and members of the Board" in its own case. 138 U. S. App. D. C. 147, 150, 425 F. 2d 578, 581 (1970). The District Court denied relief. On appeal, the Court of Appeals appears to have assumed that the "opinions" sought by respondent were limited to Statements and Summaries as defined in 32 CFR § 1480.8.[15] 138 U. S. App. D. C., at 148, and n. 2, 425 F. 2d, at 579, and n. 2. On this basis, the Court of Appeals reversed, rejecting the claim of the Renegotiation Board that the documents sought were "completely immune" from disclosure under 5 U. S. C. § 552 (b)(4), the provision of the Act exempting certain privileged or confidential information submitted to the Government by any person.[16] The court, stating that the Board was required to make available " 'final opinions, including concurring and dissenting opinions,' "[17] remanded the case to the District Court for further proceedings in which the requested documents were to be made available after "suitable deletions." 138 U. S. App. D. C., at 150, 425 F. 2d, at 581.

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[15] Title 32 CFR § 1480.8 read in pertinent part:

"Except as authorized . . . opinions and orders will not be published or made available to the public . . . inasmuch as they are regarded as confidential . . . by reason of the confidential data furnished by contractors. . . . For the purposes of this paragraph, the term 'opinion' includes a statement furnished pursuant to [32 CFR Part 1477] and the term 'order' includes an agreement to eliminate excessive profits, as well as a unilateral determination. Opinions and orders are not cited as precedents in any renegotiation proceedings."

Part 1477, as written during the period 1962–1967, included only Statements and Summaries.

[16] Title 5 U. S. C. § 552 (b)(4) exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential matters."

[17] 138 U. S. App. D. C., at 149, 425 F. 2d, at 580, quoting from 5 U. S. C. § 552 (a)(2)(A).

Subsequent to the remand of the case by the Court of Appeals, the Board turned over to respondent certain documents, including Statements and Summaries, in attempted compliance with the mandate of that court. Respondent, not satisfied with the documents so disclosed, moved in the District Court for the disclosure, *inter alia*, of (1) Division Reports in all cases in which neither "Statements" nor "Summaries" were created; (2) Regional Board Reports resulting in a clearance; and (3) any document concurring in or dissenting from (1) and (2) above.[18]

On the question whether these documents were "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," 5 U. S. C. § 552 (a)(2)(A), the District Court permitted respondent to take the deposition of the then Chairman of the Board. That deposition of the Chairman constitutes almost the only evidence of record in this case bearing on this question other than the pertinent statutes and regulations. Although conceding, as it had to on the basis of the Chairman's deposition, that only the Board had final decisional authority, and that it studies and considers, but does not adopt Regional Board or Division Reports, the District Court held that these reports were "final opinions" for purposes of the Act and rejected the Board's contention that the documents were specifically exempted from disclosure under subsection (b)(5) of the Act, 5 U. S. C. § 552 (b)(5) (Exemption 5), which encompasses:

> "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[18] A more detailed description of the documents sought is set out in the opinion written by the District Court after the initial remand from the Court of Appeals, 325 F. Supp., at 1151.

As to the Regional Board Reports in clearance cases, the court characterized the clearance as the "decision" of the Regional Board "unless the Board is not in accord"; and held that "[i]n order for the public to be fully informed, the reasons behind the clearance . . . must be made available and in this type of case such . . . reasons are found in the Regional Board's report." As to the Division Reports, the court said that, although the Board may disagree with the reasoning of the report, "[i]t is in fact the last document which explains reasons for the Board's decision," it should "at the very least . . . reflect the analysis of one member," and thus it must be disclosed at least as a "concurring [or] dissenting opinion." 5 U. S. C. § 552 (a)(2)(A). On appeal, the Court of Appeals affirmed the "findings of fact" and "conclusions" reached by the District Court and found two additional grounds supportive of the lower court's judgment as to the Regional Board Reports. The court held that, even if the Regional Board Reports recommending a clearance subsequently approved by the Board [19] were not "final opinions" of *the Board*, they were disclosable as final opinions of the Regional Board: the Regional Board itself was to be considered an "agency" for purposes of the Act, and the reports were certainly *its* "final opinions" and, as such, they were disclosable under the express provisions of 5 U. S. C. § 552 (a)(2)(A) and therefore outside the scope of Exemption 5. In concluding that the Regional Boards are agencies, the court relied in part on the power of the Regional Boards finally to dispose of certain Class B

[19] The District Court had held the reports of Regional Boards to be disclosable only in instances where a Regional Board made a final recommendation for a clearance and the Board concurred in the recommendation. *Id.*, at 1154. The Court of Appeals did not purport to extend the holding of the District Court to Regional Board Reports in other contexts.

cases.[20] In concluding that its decisions were "final," notwithstanding inevitable Board review, it analogized the power of the Regional Board in Class A cases to the power of a United States district court: the former's decisions being reviewable by the Board and the latter's by a United States court of appeals. The fact that the Regional Board's decisions were subject to review did not obviate the fact, any more than it does in the case of a United States district court, that its decisions are "final," 157 U. S. App. D. C. 121, 128, 482 F. 2d 710, 717 (1973), and that its report leading to a clearance was perforce a "final opinion" of an "agency" subject to disclosure under the Act. The Court of Appeals additionally held that the Regional Board Reports were, in any event, "identifiable records," 5 U. S. C. § 552 (a)(3), which are disclosable, unless exempt, and that these reports were not within the purview of Exemption 5 of the Act, because they "are not solely part of the consultative and deliberative process, but rather reflect actual decisions communicated outside the agency." 157 U. S. App. D. C., at 129, 482 F. 2d, at 718. See *NLRB* v. *Sears, Roebuck & Co., ante,* p. 132.

The Board brought the case to this Court and we granted certiorari, 417 U. S. 907 (1974), setting the case for argument with *NLRB* v. *Sears, Roebuck & Co., ante,* p. 132, in order to resolve the important questions presented particularly with respect to the proper construction and interpretation of Exemption 5 of the Act. For reasons set forth hereafter, we reverse the judgment of the Court of Appeals.

III

Strictly speaking, the issue in this case is whether the Division Reports and the Regional Board Reports fall

[20] 157 U. S. App. D. C. 121, 126–127, and nn. 20 and 23, 482 F. 2d 710, 715–716, and nn. 20 and 23 (1973).

within Exemption 5, pertaining to "inter-agency or intra-agency memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552 (b)(5).[21] As we hold today in the companion case of *NLRB* v. *Sears, Roebuck & Co., ante,* at 149, Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context; and both Exemption 5 and the case law which it incorporates distinguish between predecisional memoranda prepared in order to assist an agency decisionmaker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not. Because only the full Board has the power by law to make the decision whether excessive profits exist; because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that the reasoning in the reports is adopted by the Board as *its* reasoning, even when it agrees with the conclusion of a report, we con-

[21] Grumman claims that the documents are "final opinions" expressly made disclosable, pursuant to 5 U. S. C. § 552 (a)(2)(A). However, as we noted in the companion case of *NLRB* v. *Sears, Roebuck & Co., ante,* at 147–148, a conclusion that the documents are within Exemption 5 would be dispositive in the Government's favor, since the Act "does not apply" to such documents; and a contrary conclusion would be dispositive against the Government, since it concedes that the documents are "identifiable records" otherwise disclosable pursuant to 5 U. S. C. § 552 (a)(3). Thus, strictly speaking, the question whether the documents are "final opinions" is relevant only in deciding whether Exemption 5 applies to them and is important only because we have construed Exemption 5 in *NLRB* v. *Sears, Roebuck & Co., ante,* at 153–154, not to include "final opinions" within the meaning of 5 U. S. C. § 552 (a)(2)(A).

clude that the reports are not final opinions and do fall within Exemption 5.

A. *Regional Board Reports*

It is undisputed that the Regional Boards had no legal authority to decide whether a contractor had received "excessive profits" in Class A cases.[22] In such cases, the Regional Boards could investigate and recommend, but only the Board could decide. 32 CFR §§ 1472.3–1472.4. The reports were prepared long before the Board reached its decision. The Board used the Regional Board Report as a basis for discussion and, even when it agreed with the Regional Board's conclusion, it often did so as a result of an analysis of the flexible statutory factors completely different from that contained in the Regional Board Report. Chairman Hartwig testified:

> "[W]hen the recommendation clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it. It does not ratify or adopt any of these staff memoranda. It simply, in the exercise of its judgment, says it is a clearance or it isn't a clearance.

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[22] We decline to consider whether this case would be different if the Regional Boards had *de facto* decisional authority—*i. e.*, if, instead of making up its own mind in each case, the Board "reviewed" the Regional Board's recommendation under a clearly erroneous or some other deferential standard; or if the Board failed even to review the vast bulk of the reports, absent special circumstances. There is no evidence in the record indicating that the Regional Boards had such *de facto* authority. Indeed, the evidence is to the contrary. In a recent review by the Comptroller General of 209 cases, the Board concurred in the Regional Board's recommendation only 85 times. Comptroller General, Report to the Congress: The Operations and Activities of the Renegotiation Board 33–34 (B–163520—May 1973).

> And there is no Board-adopted document which you could call an opinion." App. 79.

The Regional Board Reports are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited and thus undisclosed, in order to supply maximum assistance to the Board in reaching its decision. Moreover, absent indication that its reasoning has been adopted, there is little public interest in disclosure of a report. "The public is only marginally concerned with reasons supporting a [decision] which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a [decision] which was actually adopted on a different ground." *NLRB* v. *Sears, Roebuck & Co., ante,* at 152. Indeed, release of the Regional Board's reports on the theory that they express the reasons for the Board's decision would, in those cases in which the Board had other reasons for its decision, be affirmatively misleading. *Sterling Drug, Inc.* v. *FTC,* 146 U. S. App. D. C. 237, 246–247, 450 F. 2d 698, 707–708 (1971); *International Paper Co.* v. *FPC,* 438 F. 2d 1349, 1358 (CA2), cert. denied, 404 U. S. 827 (1971). Accordingly, these reports are not "final opinions," they do fall within the protection of Exemption 5, and they are not subject to compulsory disclosure pursuant to the Act.

The Court of Appeals' attempt to impute decisional authority to Regional Boards by analogizing their final recommendations to the final decisions of United States district courts must fail. The decision of a United States district court, like the decision of the General Counsel of the NLRB discussed in *NLRB* v. *Sears, Roebuck & Co., ante,* at 158–159, n. 25, has real operative effect independent of "review" by a court of appeals: absent appeal by one of the parties, the decision has the force of law; and, even if an appeal is filed, the court

of appeals will be bound, within limits, by certain of the district court's conclusions.[23] The recommendation of a Regional Board, by contrast, has no operative effect independent of the review: consideration of the case by the Board is not dependent on the decision by a party to "appeal"—such consideration is an inevitable event without which there is no agency decision; and the recommendation of the Regional Board carries no *legal* weight whatever before the Board—review by the latter is, as the Court of Appeals conceded, *de novo*. Indeed, "review" is an entirely inappropriate word to describe the process by which the Board decides whether to issue a clearance following a recommendation to that effect by the Regional Board. The latter's recommendation is functionally indistinguishable from the recommendation of any agency staff member whose judgment has earned the respect of a decisionmaker. There is simply no sense in which Regional Boards have the power to make "final dispositions" and thus no sense in which the explanations of their recommendations can be characterized as "final opinions." [24] See *NLRB* v. *Sears, Roebuck & Co., ante,* at 158–159.

In concluding that the Regional Board Reports are within the scope of Exemption 5, it is unnecessary to

[23] Fact determinations, for example, are reviewable under a "clearly erroneous" standard and certain legal judgments only for abuse of discretion.

[24] The distinction, between "recommendations" and "final opinions" subject to review, for Exemption 5 purposes is compelling. In order that a decisionmaker consider all the arguments in support of all the options, those who recommend should be encouraged to make arguments which they would not make in public and with which they may even disagree. However, if their recommendations were to have operative effect and thus qualify as decisions—even though subject to review—they should be *discouraged* from basing their decisions on arguments which they would not make publicly and with which they disagree.

decide whether, as respondent strenuously argues and the Court of Appeals concluded, the Regional Boards are themselves "agencies" for the purposes of the Act. Respondent and the court below proceed on the premise that the final written product of an "agency's" deliberations may never fall within Exemption 5, and reason that since the Regional Board Report is the final product of the Regional Board, it must therefore be disclosable *if* the Regional Board is a separate agency.[25] The premise is faulty, however, overlooking as it does the fact that Exemption 5 does not distinguish between *inter*-agency and *intra*-agency memoranda. By including *inter*-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency. Thus, if the Regional Boards are agencies for Class A purposes, their final recommendations are *inter*-agency memoranda; and, if they are not agencies separate from the Board, their recommendations are *intra*-agency memoranda. In either event, the Regional Boards' total lack of decisional authority brings their reports within Exemption 5 and prevents them from being "final opinions."

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[25] We note in passing that, while the conclusion of the court below that the Regional Board's status as an agency stemmed from its power to issue "orders" in Class B cases finds support in the cases, *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1358–1359 (CA2), cert. denied, 404 U. S. 827 (1971); *Washington Research Project, Inc.* v. *Department of HEW*, 164 U. S. App. D. C. 169, 504 F. 2d 238 (1974), cert. pending, No. 74–736, the Court of Appeals never considered the possibility that the Regional Board might be an agency for Class B purposes and not for Class A purposes.

B. *Division Reports*

It is equally clear that a division of the Board has no legal authority to decide. Once again, it may analyze and recommend, but the power to decide remains with the full Board. The evidence is uncontradicted that the Division Reports were prepared before the Board reached its decision, were used by the full Board as a basis for discussion, and, as the Chairman testified, were "prepared for and designed to assist the members of the Board in their deliberations"; nor is the discussion limited to the material and analysis contained in the Division Report. Following the discussion, *any* Board member may disagree with the report's conclusion or agree with it for reasons other than those contained in the report. Indeed, as Chairman Hartwig testified, it is likely that this will occur because of the highly judgmental nature of the Board's decisions given the number and generality of the statutory criteria. In any event, the reasoning of the Division Report is never adopted—though its conclusion may be—and no effort is made to reach agreement on anything but the result.

It is true that those who participate in the writing of the Division Report are among those who participate in the Board's decision, and that, human nature being what it is, they may not change their minds after discussion by the full Board. This creates a greater likelihood that the Board's decision will be in accordance with the Division Report than is the case with respect to a Regional Board Report and that, where the Board's decision is different, the Division Report will reflect the final views of at least one of the Board's members. See *NLRB* v. *Sears, Roebuck & Co., ante,* at 158–159, n. 25. However, this is not necessarily so. The Board obviously considers its discussion following the creation of the Division Report to be of crucial importance to its decision for, not-

withstanding the fact that a division is made up of a majority of the Board, it has been delegated no decisional authority. The member of the Board who wrote the report may change his mind as a result of the discussion or, consistent with the philosophy of Exemption 5, he may have included thoughts in the report with which he was not in agreement at the time he wrote it. The point is that the report is created for the purpose of discussion, and we are unwilling to deprive the Board of a thoroughly uninhibited version of this valuable deliberative tool by making Division Reports public on the unsupported assumption that they always disclose the final views of at least some members of the Board.[26]

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[26] Since *all* of the members of the division are free to change their minds after deliberation and are free to place thoughts or arguments in the Division Reports which were only tentative in the first place, we need not reach the question whether a concurring or dissenting opinion must be disclosed even where no opinion expressing the view of the agency is written.

Respondent argues that Division Reports, as well as concurrences or dissents thereto, constitute "final opinions" of the Board or individual members of the Board, relying on a specific reference, assertedly made to such documents, in the House Report which accompanied the Act, H. R. Rep. No. 1497, 89th Cong., 2d Sess. (1966). That report, in speaking to the Committee's understanding of what is now codified as 5 U. S. C. § 552 (a)(2)(A), stated:

"[Subsection (A)] requires concurring and dissenting opinions to be made available for public inspection. The present law, requiring most final opinions and orders to be made public, implies that dissents and concurrences need not be disclosed. As a result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—including . . . the Renegotiation Board—do not make public the minority views of their members." H. R. Rep. No. 1497, *supra*, at 8.

This statement from the legislative history of the Act supports the proposition that Congress intended the Board to be subject to the

The effect of this decision is that, in those cases in which Statements and Summaries were not issued, the public will be largely uninformed as to the basis for decisions by the Renegotiation Board. Indeed, the decisions of both courts below—conceding as they both did the absence of decisional authority in either the Regional Boards or divisions of the statutory board—appear to have rested in the final analysis on the notion that the Renegotiation Board has an affirmative obligation under the Act to make public the reasons for its decisions; and that it must disclose its opinion *or the nearest thing to an opinion* in every case. However, Congress explicitly exempted the Renegotiation Board from all provisions of

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Act's provisions, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S., at 16, and at first blush lends support to respondent's contention that Congress assumed, in passing the Act, that the Board was issuing "final opinions" in cases, that the Board was withholding concurrences and dissents to those final opinions, and that § 552 (a)(2)(A) was designed to put an end to this practice. Our research convinces us, however, that this language from the House Report is not to be so read. The "survey" referred to in the report was conducted in 1963 by the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations of the House. The unpublished data gathered during that survey indicate that, in response to three questions submitted by the subcommittee to the Board, concerning its practices with respect to opinion writing and publication, the Board stated:

"Except as authorized in Renegotiation Board Regulations 1480.4 (a) (attached), opinions and orders of the Renegotiation Board are not published or made available to the public (see RBR [32 C. F. R. §] 1480.8) . . . ."

As our prior discussion of 32 CFR § 1480.8, n. 15, *supra*, makes clear, the "opinions" to which the Board referred were Statements and Summaries. Thus, the reference to concurring and dissenting opinions in the House Report, with respect to the Renegotiation Board, was not to Division Reports but was to nonexistent concurrences to and dissents from Statements and Summaries which were already being made public.

the Administrative Procedure Act except for the Public Information Section. 50 U. S. C. App. § 1221. Thus the opinion-writing section of the APA, 5 U. S. C. § 557—which itself applies only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing" and even then only if the agency decision is not subject to *de novo* court review, 5 U. S. C. § 554—is inapplicable to Board decisions. The Freedom of Information Act imposes no independent obligation on agencies to write opinions. It simply requires them to disclose the opinions which they do write. *NLRB* v. *Sears, Roebuck & Co., ante,* p. 132. If the public interest suffers by reason of the failure of the Board to explain some of its decisions, the remedy is for Congress to require it to do so. It is not for us to require disclosure of documents, under the purported authority of the Act, which are not final opinions, which do not accurately set forth the reasons for the Board's decisions, and the disclosure of which would impinge on the Board's predecisional processes.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

COSTARELLI *v.* MASSACHUSETTS

APPEAL FROM THE MUNICIPAL COURT OF THE CITY OF BOSTON, MASSACHUSETTS

No. 73-6739. Argued March 17, 1975—Decided April 28, 1975

After the Boston Municipal Court, in which no jury is provided, denied his motion for a jury trial on a criminal charge and that court adjudged him guilty after trial, appellant appealed, pursuant to Massachusetts' two-tier trial system, to the Superior Court where he could obtain a *de novo* trial with a jury. But before proceedings were had in the Superior Court, appellant appealed to this Court, claiming, *inter alia*, that the Sixth and Fourteenth Amendments required a jury trial in his first trial, whether in the Municipal or Superior Court. *Held:* This Court has no jurisdiction over the appeal under 28 U. S. C. § 1257, since the Municipal Court's judgment is not a judgment of the highest state court in which a decision could be had, it appearing that under Massachusetts procedure appellant can raise his constitutional issues in Superior Court by a motion to dismiss and can obtain appellate review of an adverse decision through appeal to the Massachusetts Supreme Judicial Court. *Largent* v. *Texas*, 318 U. S. 418, distinguished.

Appeal dismissed.

Robert W. Hagopian, by appointment of the Court, 419 U. S. 1066, argued the cause and filed a brief for appellant.

David A. Mills, Assistant Attorney General of Massachusetts, argued the cause for appellee. With him on the brief were *Francis X. Bellotti*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General.*

PER CURIAM.

Under Massachusetts procedure, a "two-tier" system is utilized for trial of a variety of criminal charges. The

**Malvine Nathanson* filed a brief for the Massachusetts Defenders Committee as *amicus curiae* urging reversal.

initial trial under this system is in a county district court or the Municipal Court of the City of Boston. No jury is available in these courts, but persons who are convicted in them may obtain a *de novo* trial, with a jury, in the appropriate superior court by lodging an "appeal" with that court.[1] At the *de novo* trial, all issues of law and fact must be determined anew and are not affected by the initial disposition. In effect, the taking of the appeal vacates the district court or Municipal Court judgment, leaving the defendant in the position of defendants in other States which require the prosecution to present its proof before a jury.[2]

In January 1974, appellant Costarelli was charged with knowing unauthorized use of a motor vehicle, an offense under Mass. Gen. Laws, c. 90, § 24 (2)(a) (Supp. 1975). The offense carries a maximum sentence of a $500 fine and two years' imprisonment, and is subject to the two-tier system described above. Prior to trial in the Municipal Court, Costarelli moved for a jury trial. The motion was denied and the trial before the court resulted in a judgment of guilty. A one-year prison sentence was imposed. Costarelli thereupon lodged an appeal in the Superior Court for Suffolk County.

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[1] See Mass. Gen. Laws, c. 218, § 27A, and c. 278, § 18 (Supp. 1975); c. 278, § 18A (1972).

Unlike the situation in *Colten* v. *Kentucky*, 407 U. S. 104 (1972), the initial trial cannot be avoided by a plea of guilty without also waiving the right to a jury trial in superior court.

[2] Appellant argues that in several respects the district court or Municipal Court judgment remains in effect despite the lodging of an appeal. In particular, he points to the facts that if a defendant defaults in superior court, the first-tier judgment becomes the legal basis for imposing sentence, and that appeal does not eliminate such collateral consequences as revocation of parole or of a driver's permit. These matters do not affect the result we announce today, and merit no further discussion.

Without awaiting proceedings in Superior Court, Costarelli appealed to this Court,[3] seeking to establish that the Sixth and Fourteenth Amendments require that a jury be available in his first trial, whether it be in the Municipal Court or the Superior Court. He also raised speedy trial and double jeopardy contentions as bars to his retrial before a jury. On October 21, 1974, we postponed further consideration of the question of jurisdiction to the hearing on the merits. 419 U. S. 893. We now dismiss for want of jurisdiction. Title 28 U. S. C. § 1257 limits our review to the judgment of the highest state court in which a decision could be had, and we conclude that this is not such a judgment.

That a decision of a higher state court might have been had in this case is established by a recent decision of the Supreme Judicial Court of Massachusetts, *Whitmarsh* v. *Commonwealth*, —— Mass. ——, 316 N. E. 2d 610 (1974), in which another criminal defendant sought relief from Massachusetts' two-tier trial system. After conviction without a jury in the first tier, Whitmarsh took his appeal to the Superior Court, but thereupon sought immediate review of his constitutional contentions in the Supreme Judicial Court. As one potential basis of that court's jurisdiction, he asserted its power of "general

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[3] There is some question as to whether review should have been sought by way of a petition for certiorari rather than appeal. Under 28 U. S. C. § 1257 (2), we have appellate jurisdiction when the constitutional validity of a state statute is drawn in question and the decision is in favor of its validity. In the present case it is not clear that the denial of a jury in the first-tier trial resulted from the operation of a statute rather than of custom and practice. We need not resolve the issue, because it cannot affect our disposition—if not properly denominated an appeal, we would treat the papers as a petition for certiorari, 28 U. S. C. § 2103, and the highest-state-court requirement of § 1257 applies to petitions for certiorari as well as to appeals.

superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein *if no other remedy is expressly provided.*" Mass. Gen. Laws, c. 211, § 3 (1958) (emphasis added). The Supreme Judicial Court rejected this basis of jurisdiction on the ground that another remedy was in fact expressly provided. It stated:

> "The constitutional issue the plaintiff now asks us to decide is the same issue which he raised in the District Court, and in the Superior Court by his motion to dismiss. If his motion were denied, and if he were thereafter tried in the Superior Court and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto." — Mass., at —, 316 N. E. 2d, at 613 (footnote omitted).

It is thus clear that Costarelli can raise his constitutional issues in Superior Court by a motion to dismiss, and can obtain state appellate review of an adverse decision through appeal to the state high court. That the issue might be mooted by his acquittal in Superior Court is, of course, without consequence, since an important purpose of the requirement that we review only final judgments of highest available state courts is to prevent our interference with state proceedings when the underlying dispute may be otherwise resolved. Cf. *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67 (1948); *Gorman* v. *Washington University*, 316 U. S. 98, 100–101 (1942).

Costarelli argues that resort to the remedy outlined in *Whitmarsh* should be unnecessary, because it cannot produce the relief to which he believes he is entitled. He is of the opinion that if the Superior Court denied his motion to dismiss, he would have no alternative but to proceed to trial before a jury. Once this occurred the

error would, he fears, have been cured, or at least mooted.

But we think this contention confuses an argument of substantive constitutional law with an argument relating to the application of 28 U. S. C. § 1257. *Whitmarsh* undoubtedly contemplates that in the event the Superior Court were to deny Costarelli's motion, he would then have to proceed to trial. But just as surely it contemplates that in the event that judgment were adverse to him, he could appeal to the Supreme Judicial Court and raise before it precisely the constitutional question which had been raised by the motion to dismiss in the Superior Court. Whether the fact that he was afforded a jury trial in the Superior Court proceeding "cured" or "mooted" his federal constitutional claim is a matter of federal constitutional law, for determination initially in state courts and ultimately by this Court. That the state courts might conclude that the second-tier trial terminated his claim does not mean that Costarelli may draft his own rules of procedure in order to raise the claim only before those Massachusetts courts which he deems appropriate. Massachusetts affords him a method by which he may raise his constitutional claim in the Superior Court, and a method by which he may, if necessary, appropriately preserve that claim for assertion in the Supreme Judicial Court. The Supreme Judicial Court of Massachusetts, therefore, is "the highest court of a State in which a decision could be had" on his claim. Since no decision has been had in that court, we lack jurisdiction of this case.

Appellant relies on language from *Largent* v. *Texas*, 318 U. S. 418 (1943), to support a contrary result. In that case we reviewed a judgment of the County Court of Lamar County, Tex. We did so because under Texas law the state-court system provided no appeal from that judgment of conviction. We noted

that state habeas corpus was available to test the constitutionality on its face of the ordinance under which Mrs. Largent had been convicted, but that it was not available to test its constitutionality as applied in her particular case.

We then stated:

> "Since there is, by Texas law or practice, no method which has been called to our attention for reviewing the conviction of appellant, *on the record made in the county court,* we are of the opinion the appeal is properly here under § [1257 (2)] of the Judicial Code." *Id.,* at 421 (emphasis added).

Appellant argues that because the proceeding in Massachusetts Superior Court would not be a review on the record made in Municipal Court, the *de novo* proceeding in Superior Court is a collateral proceeding which need not, under *Largent,* be utilized to satisfy the highest-court requirement.

Appellant's reliance is misplaced. In *Largent,* we went on to say:

> "The proceeding in the county court was a distinct suit. It disposed of the charge. The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant. Cf. *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 14; *Bryant* v. *Zimmerman,* 278 U. S. 63, 70." 318 U. S., at 421–422.

The present case is plainly distinguishable. Here the Municipal Court proceeding did not finally dispose of the charge, and the proceeding in Superior Court is not

a distinct suit or proceeding. It is instead based on precisely the same complaint as was the Municipal Court trial. In *Largent*, the available review on habeas corpus was not based on the record in county court for the reason that habeas review was sharply limited in scope. Similarly, in *Bandini Co.*, cited in *Largent*, the "distinct suit" was a proceeding for a writ of prohibition in which the only litigable issue was lower court jurisdiction.

Here, on the contrary, the review is not circumscribed so as to be narrower than normal appellate-type review on the record made in an inferior court, but is instead so broad as to permit *de novo* relitigation of all aspects of the offense charged, whether they be factual or legal. It is because of the *breadth* of appellate review, not its *narrowness*, as in *Largent*, that the record is not the basis of review in Superior Court. Greater identity of proceedings in two different courts would be difficult to imagine, and it would be strange indeed to class the Superior Court trial as a form of "collateral" review of the Municipal Court judgment in the same sense as habeas corpus is traditionally thought of as a "collateral attack" on a judgment of conviction.

The appeal is dismissed for want of jurisdiction.

So ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

GURLEY, DBA GURLEY OIL CO. *v.* RHODEN, CHAIRMAN, TAX COMMISSION OF MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 73-1734. Argued March 18, 1975—Decided May 12, 1975

Mississippi imposes a 5% sales tax upon the "gross proceeds" of retail sales of tangible personal property, including gasoline, and such gross proceeds are computed without deduction for any taxes. Mississippi also imposes a gasoline excise tax on each gallon sold by a distributor, which in the case of a distributor bringing gasoline into the State otherwise than by common carrier, accrues at the time when and at the point where the gasoline is brought into the State. And a federal gasoline excise tax is imposed on each gallon sold by a "producer," 26 U. S. C. § 4081 (a), defined to include any person to whom gasoline is sold tax free, § 4082 (a). Contending that the denial of a deduction for the Mississippi and federal excise taxes in computing the gross proceeds of retail gasoline sales for purpose of the sales tax was unconstitutional as a taking of property without due process in violation of the Fourteenth Amendment, and that he acts as a mere collector of the excise taxes whose legal incidence is upon the purchaser-consumer, petitioner, an operator of several service stations in Mississippi who purchased his gasoline tax free in other States and transported it to Mississippi in his own trucks, paid the sales taxes under protest and sued for a refund in state court. His suit was dismissed, and the Mississippi Supreme Court affirmed, holding that the legal incidence of both excise taxes is on petitioner and not on the purchaser-consumer. *Held:* The denial of the deduction of the Mississippi and federal gasoline excise taxes in computing the gross proceeds of retail sales for purposes of the sales tax is not unconstitutional. Pp. 203-212.

(a) As reflected by the language of 26 U. S. C. §§ 4081 (a) and 4082 (a), and their legislative history, the legal incidence of the federal excise tax is on the statutory "producer," such as petitioner, and not on his purchaser-consumer. Pp. 204-208.

(b) The Mississippi Supreme Court's holding that the legal incidence of the state excise tax falls on petitioner, being consistent

with a reasonable interpretation of the statute, is conclusive. Pp. 208–210.

(c) Petitioner's claim that liability for the excise taxes and sales tax arises simultaneously and results in a sales tax upon the excise tax is without merit, since the excise taxes attach prior to the point of the retail sale. Pp. 210–211.

(d) Petitioner is not denied equal protection as against dealers in other States who are not required to include the federal excise tax as part of the sales tax base, since the prohibition of the Equal Protection Clause is against its denial by the State as between taxpayers subject to its laws. Pp. 211–212.

288 So. 2d 868, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined except DOUGLAS, J., who took no part in the consideration or decision of the case.

Charles R. Davis argued the cause for petitioner. With him on the briefs was *Walter A. Armstrong, Jr.*

Hunter M. Gholson argued the cause for respondent. With him on the brief was *William G. Burgin, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Mississippi imposes a 5% sales tax upon the "gross proceeds of the retail sales" of tangible personal property, including gasoline. Miss. Code Ann. § 27–65–17 (Supp. 1974).[1] Petitioner operates as a sole proprietorship from West Memphis, Ark. He owns and operates five gasoline service stations in Mississippi and also sells gasoline at four other stations in Mississippi on a consignment basis. He purchases his gasoline tax free

[1] Section 27–65–17 provides in pertinent part:

"Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five percent (5%) of the gross proceeds of the retail sales of the business, except as otherwise provided herein. . . ."

from sources in Tennessee and Arkansas. He transports the gasoline to his Mississippi stations in his own trucks. He holds a Mississippi distributor's permit and is also federally licensed because he is a "producer" within the meaning of the Internal Revenue Code as one who sells gasoline bought tax free from other "producers." [2] He adds to his pump prices the amount of a Mississippi gasoline excise tax, now nine cents per gallon, Miss. Code Ann. § 27–55–11 (Supp. 1974), and a federal gasoline excise tax of four cents per gallon, 26 U. S. C. § 4081 (a).[3] The State computes his gross proceeds of retail sales "without any deduction for . . . taxes of any kind . . . ." Miss. Code Ann. § 27–65–3 (h) (Supp. 1974).[4] Petitioner contends that the denial of a deduc-

[2] 26 U. S. C. § 4082 (a), n. 3, *infra*.

[3] Mississippi Code Ann. § 27–55–11 provides:

"Any person in business as a distributor of gasoline . . . shall pay for the privilege of engaging in such business . . . an excise tax equal to [specified] cents per gallon on all gasoline . . . sold . . . in this state for sale [or] use on the highways . . . .

. . . . . .

"With respect to distributors . . . who bring . . . into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor . . . at the time when and at the point where such gasoline is brought into the state."

Title 26 U. S. C. § 4081 (a) provides:

"In general. There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Title 26 U. S. C. § 4082 (a) provides in pertinent part:

"Producer. . . . Any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline."

[4] Section 27–65–3 (h) provides in pertinent part:

" 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property . . . without any deduction for . . . taxes of any kind except those expressly exempt . . . ."

tion of the amount of the excise taxes added to his pump prices in the computation of his "gross proceeds of the retail sales" of gasoline, and the resultant application of the 5% sales tax to so much of his pump prices as reflects the amount of the taxes, are unconstitutional. He therefore paid the sales taxes to that extent under protest, and sued for a refund in Mississippi Chancery Court, Hinds County. Respondent cross-claimed for unpaid sales taxes accruing after the filing of the suit.[5] After trial, the Chancery Court dismissed petitioner's suit and entered judgment for respondent on the cross-claim. The Supreme Court of Mississippi affirmed. 288 So. 2d 868. We granted certiorari, 419 U. S. 1018 (1974). We affirm.

I

Petitioner's principal argument is that he acts as a mere collector of the taxes for the two governments because the legal incidence of both excise taxes is upon the purchaser-consumer. Upon that premise, he argues: "Consequently, to impose the Mississippi sales tax upon amounts so received by [petitioner] would be to tax him upon gross receipts which are not his gross receipts, but rather the gross receipts of [the two governments]. This would not only violate the fundamental conception of right and justice, but it would be taking [petitioner's] property without due process of the Fourteenth Amendment . . . ." Brief for Petitioner 37. He cites in support the statement in *Hoeper* v. *Tax Comm'n*, 284 U. S. 206, 215 (1931), that "any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

[5] Petitioner sought refunds of $62,782.57, and respondent cross-claimed for $29,131.19.

Also, petitioner advances an alternative argument limited to the denial of the deduction of the amount of the federal excise tax. He contends that the denial results to that extent in "a state tax on . . . monies held in trust by [petitioner] as agent for the United States [and] is, in essence, a tax upon the United States . . . [that] . . . is clearly unconstitutional" as violating the constitutional immunity of the United States and its property from taxation by the States. *M'Culloch* v. *Maryland,* 4 Wheat. 316 (1819). Brief for Petitioner 48.

Petitioner's arguments can prevail, as he apparently concedes, only if the legal incidence of the excise taxes is not upon petitioner, but upon the purchaser-consumer. Our task therefore is to determine upon whom the legal incidence of each tax rests.

II

The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision as to where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The Court has laid to rest doubts on that score raised by such decisions as *Panhandle Oil Co.* v. *Mississippi ex rel. Knox,* 277 U. S. 218 (1928); *Indian Motorcycle Co.* v. *United States,* 283 U. S. 570 (1931); and *Kern-Limerick, Inc.* v. *Scurlock,* 347 U. S. 110 (1954), at least under taxing schemes, as here, where neither statute required petitioner to pass the tax on to the purchaser-consumer. See *Alabama* v. *King & Boozer,* 314 U. S. 1 (1941); *Lash's Products Co.* v. *United States,* 278 U. S. 175 (1929); *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572 (1930); *First*

Agricultural Nat. Bank v. *Tax Comm'n,* 392 U. S. 339 (1968); *American Oil Co.* v. *Neill,* 380 U. S. 451 (1965).

A majority of courts that have considered the question have held, in agreement with the Mississippi Supreme Court in this case, that the legal incidence of the federal excise tax is upon the statutory "producer" such as petitioner and not upon his purchaser-consumer. *Martin Oil Service, Inc.* v. *Department of Revenue,* 49 Ill. 2d 260, 273 N. E. 2d 823 (1971); *People* v. *Werner,* 364 Ill. 594, 5 N. E. 2d 238 (1936); *Sun Oil Co.* v. *Gross Income Tax Division,* 238 Ind. 111, 149 N. E. 2d 115 (1958); *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.,* 121 Ga. App. 454, 174 S. E. 2d 224, aff'd, 226 Ga. 883, 178 S. E. 2d 173 (1970). Contra, see *Tax Review Board* v. *Esso Standard Division,* 424 Pa. 355, 227 A. 2d 657 (1967); cf. *Standard Oil Co.* v. *State,* 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co.* v. *State Tax Comm'r,* 71 N. D. 146, 299 N. W. 447 (1941). Our independent examination of the federal statute and its legislative history persuades us also that the legal incidence of the federal tax falls upon the statutory "producer" such as petitioner.

The wording of the federal statute plainly places the incidence of the tax upon the "producer," that is, by definition, upon federally licensed distributors of gasoline such as petitioner. Section 4082 (a) provides that "[a]ny person to whom gasoline is sold tax-free . . . shall be considered the producer of such gasoline," and § 4081 (a) expressly imposes the tax "on gasoline *sold by the producer* . . . ." (Emphasis added.) The congressional purpose to lay the tax on the "producer" and only upon the "producer" could not be more plainly revealed. Persuasive also that such was Congress' purpose is the fact that, if the producer does not pay the tax, the Government cannot collect it from his vendees; the statute has

no provision making the vendee liable for its payment.[6] *First Agricultural Nat. Bank* v. *Tax Comm'n, supra,* at 347.

It is true that the purchaser-consumer who buys gasoline for use on his farm, 26 U. S. C. § 6420 (a), or for other nonhighway purposes, § 6421 (a), or for a local transit system, § 6421 (b), can recover payment of all or part of the amount of the tax passed on by the "producer." But this is not proof that Congress laid the tax upon the purchaser-consumer. Rather, since the proceeds of this tax go not into the general treasury, but into a special fund used to defray the cost of the federal highway system, S. Rep. No. 367, 87th Cong., 1st Sess. (1961), the refunds authorized simply reflect a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices, farmers and other off-highway users should be relieved of the economic burden of the cost of the highway program, and that the cost should be borne entirely by motorists who use gasoline to drive on the highways. *Martin Oil Service, Inc.* v. *Department of Revenue, supra,* at 265, 273 N. E. 2d, at 827.

Petitioner cites references by President Johnson to the tax as a "user tax" as proving that it is not and never was intended that the tax be imposed upon the "producer," but rather upon the purchaser-consumer.

[6] Act of June 8, 1966, c. 645, Miss. Gen. Laws 1343, 1347, in effect during some of the tax years involved, but since repealed, provided only that the excise tax "*may* be passed on to the ultimate consumer . . . ." (Emphasis added.) In contrast, the Massachusetts sales tax law before us in *First Agricultural Nat. Bank.* v. *Tax Comm'n,* 392 U. S. 339 (1968), expressly provided that the tax "'shall be paid by the purchaser,'" and that the vendor "'shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed.'" *Id.,* at 347.

President Johnson's message to Congress of May 17, 1965, on the subject of reform of the excise tax structure stated that such "reform . . . will . . . leave . . . excises on alcoholic beverages, tobacco, *gasoline,* tires, trucks, air transportation (and a few *other user-charge* and special excises) . . . ." H. R. Doc. No. 173, 89th Cong., 1st Sess., 3 (1965). (Emphasis added.) Petitioner relies also on the report of the House Committee on Ways and Means accompanying H. R. 8371, H. R. Rep. No. 433, 89th Cong., 1st Sess., 12–13 (1965). It states: "Taxes such as those on gasoline . . . are *user taxes.* . . . A tax on gasoline taxes users of the highways in rough proportion to their use of the service." (Emphasis added.) These references obviously were not made in the context of consideration of the legal incidence of the gasoline tax but merely as recognition that the reality is that users bear the economic burden of the tax. These references were rejected in *Martin Oil Service, Inc., supra,* by the Illinois Supreme Court as irrelevant to the question whether the tax must be considered as one whose incidence rests on the purchaser-consumer. We agree with, and adopt, that court's analysis:

> "We consider the references to the tax as a 'user tax' were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical nontechnical description of the tax as a 'user tax' is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us." 49 Ill. 2d, at 264, 273 N. E. 2d, at 826.

We therefore hold that the Mississippi Supreme Court, which relied upon *Martin Oil Service, Inc.,* see 288 So. 2d, at 873, properly concluded that the federal excise tax is

imposed solely on statutory "producers" such as petitioner and not on the purchaser.

III

The Mississippi Supreme Court held that the legal incidence of the Mississippi excise tax also falls upon petitioner. It is true of course that this Court is the final judicial arbiter of the question where the legal incidence of the *federal* excise tax falls. But a State's highest court is the final judicial arbiter of the meaning of state statutes, *Alabama* v. *King & Boozer,* 314 U. S., at 9–10, and therefore our review of the holding of a state court respecting the legal incidence of a state excise tax is guided by the following: "When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co.* v. *Neill,* 380 U. S., at 455–456.

This is manifestly a case in which the holding of the Mississippi Supreme Court that the legal incidence of the state excise tax falls upon petitioner should be "deemed conclusive." Mississippi Code Ann. § 27–55–11 (Supp. 1974), provides that the tax "attaches on the distributor or other person for each gallon of gasoline brought into the state . . ." in the case of distribution of gasoline by distributors, such as petitioner, who bring gasoline into Mississippi "by means other than through a common carrier." The Mississippi Supreme Court relied primarily upon this provision in reaching its conclusion, and we cannot say that its conclusion is not "consistent with the statute's reasonable interpretation."

Our determination is buttressed by the holding of a three-judge District Court in *United States* v. *Sharp,* 302

F. Supp. 668 (SD Miss. 1969). The United States sought a declaratory judgment that the Mississippi tax was invalid with respect to gasoline purchased by the Federal Government, its agencies, and personnel when used on Mississippi highways on Government business. The three-judge court held that the legal incidence of the state tax was upon the distributor-vendor and not upon the purchaser United States, and dismissed the action. The court stated:

> "We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor to whom the state looks for the payment of the tax, albeit the amount of the tax may ultimately be borne by the vendee, in this case the federal government." *Id.*, at 671.

Petitioner argues, however, that the decision of the Mississippi Supreme Court is foreclosed by this Court's decision in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 (1928). The argument is without merit. In that case Mississippi sued Panhandle Oil Co. to recover gasoline excise taxes imposed by Chapter 116 of the 1922 Laws of Mississippi, as amended, a predecessor to the present Miss. Code Ann. § 27–55–11. The taxes claimed were on account of sales made by Panhandle to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico, and of its Veterans' Hospital at Gulfport, Miss. The Court, over the dissents of Justices Holmes, Brandeis, Stone, and McReynolds, held that the tax as applied was invalid as a tax upon the means used by the United States for governmental purposes. The dissenters' view was that it was not a tax upon means used by the United States, but that Panhandle merely

shifted the economic burden of the tax to its vendees by adding it to the price of the gasoline.

The Court's *Panhandle* opinion did not focus upon whether the Mississippi statute laid the legal incidence of the tax upon the distributor. Rather, the rationale was that the tax was bad because, if laid upon distributors, the distributors were able to shift its burden to the purchaser. The Court has since expressly abandoned that view, and has accepted the analysis of the dissent. In *Alabama* v. *King & Boozer,* 314 U. S., at 9, the Court held: "So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox* . . . , we think it no longer tenable."

IV

Finally, petitioner argues that even if the legal incidence of the two taxes is on him rather than on the consumer, the provision of § 27–65–17 denying the deduction of the taxes in the computation of his "gross proceeds of . . . retail sales" is invalid for two reasons.

First, he argues: "Since [petitioner] sells only to the ultimate consumer, the excise tax attaches simultaneously with the sale and with the sales tax; therefore, there can be no sales tax upon the excise tax." Brief for Petitioner 47. In other words, his argument is that the liability for the excise taxes, state and federal, and the liability for the sales tax arise simultaneously, and in that circumstance, one should not be included in computing the other. We read the opinion of the Mississippi Supreme Court to reject this argument and to hold that the taxes fall on the "producer at a time prior to the point of retail sale or other consumer transaction . . . ." 288 So. 2d, at 870. That interpretation of the Mississippi statutes is, of course, binding on us as respects the state excise tax; indeed, the interpretation is not merely "reasonable," but seems obvious in light of the express provision of

§ 27–55–11 that in cases of distributors, like petitioner, bringing gasoline into Mississippi in their own trucks the tax "attaches . . . at the time when and at the point where such gasoline is brought into the state." Further, we agree with the Mississippi court that the federal tax also attaches prior to the point of the retail sale. However, even if the liability for the excise taxes did arise simultaneously with the sales tax, we cannot see any legal distinction, constitutional or otherwise, arising from that circumstance. The Illinois Supreme Court also addressed this contention when made in *Martin Oil Service, Inc., supra,* as to the federal excise tax, and rejected it for the following reasons, with which we agree.

> "The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is no different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his 'gross receipts' or the 'consideration' he receives for his gasoline. No reason has been given . . . why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none." 49 Ill. 2d, at 268, 273 N. E. 2d, at 828.

Second, petitioner argues that "since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax [*e. g.*, Pennsylvania, see *Tax Review Board* v. *Esso Standard, supra*], then the arbitrary

imposition of such tax upon [petitioner] and those other independent oil dealers in his class (who have to pay a sales tax on federal excise tax) would deprive [petitioner] of the Fourteenth Amendment's guarantee to equal protection of the laws." Brief for Petitioner 21. The contention is patently frivolous. The prohibition of the Equal Protection Clause is against denial by the State, here Mississippi, as between taxpayers subject to its laws. Petitioner makes no claim of unconstitutional discrimination by Mississippi in the application of its sales tax Act to taxpayers subject to that tax.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Syllabus

JOHNSON ET AL. *v.* MISSISSIPPI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–1531. Argued February 26, 1975—Decided May 12, 1975

Petitioners, six Negroes, who had been picketing and urging boycott of certain business establishments in Vicksburg, Miss., because of their alleged racial discrimination in employment, were arrested with others and charged with unlawfully conspiring to bring about a boycott. Those arrested then sought removal of the prosecutions from state to federal court pursuant to 28 U. S. C. § 1443 (1), which provides for removal of state proceedings "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens," alleging that the conspiracy statutes underlying the charges were unconstitutional, that the charges were groundless and made solely to deprive those arrested of their federally protected rights, and more particularly that their activities were protected by 18 U. S. C. § 245 (Title I of the Civil Rights Act of 1968). Section 245 (b) (5), *inter alia*, makes it a crime by "force or threat of force" to injure, intimidate, or interfere with any person because he has been "participating lawfully in speech or peaceful assembly" opposing racial discrimination in employment, but § 245 (a) (1) provides that § 245 shall not be construed as indicating Congress' intent to prevent any State from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of § 245. The District Court denied removal, and the Court of Appeals affirmed, holding that § 245 "confers no rights whatsoever" and that a federal statute must "provide" for the equal rights of citizens before it can be invoked as a basis for removal of prosecutions under § 1443 (1). *Held:* Removal under § 1443 (1) was not warranted based solely on petitioners' allegations that the statutes underlying the charges were unconstitutional, that there was no basis in fact for those charges, or that their arrest and prosecution otherwise denied them their constitutional rights. *Georgia* v. *Rachel*, 384 U. S. 780; *City of Greenwood* v. *Peacock*, 384 U. S. 808. Nor does § 245 furnish adequate basis for removal under § 1443 (1). Pp. 222–227.

(a) The Mississippi courts undoubtedly have jurisdiction over conspiracy and boycott cases brought under state law, and § 245

(a)(1) appears to disavow any intent to interrupt such state prosecutions, a conclusion that is also implicit in § 245's operative provisions, since § 245 (b) on its face focuses on the use of force, and its legislative history confirms that its central purpose was to prevent and punish *violent* interferences with the exercise of specified rights and that it was not aimed at interrupting or frustrating the otherwise orderly processes of state law. Pp. 223–227.

(b) Thus viewed in the context of § 245's being directed at crimes of racial violence, a state prosecution, proceeding as it does in a court of law, cannot be characterized as an application of "force or threat of force" within the meaning of § 245, and whatever "rights" that section may confer, none of them is denied by a state criminal prosecution for conspiracy or boycott, there being no "federal statutory right that no State should even attempt to prosecute [petitioners] for their conduct," *Peacock, supra,* at 826. P. 227.

(c) The absence of any evidence or legislative history indicating that Congress intended to accomplish in 18 U. S. C. § 245 what it has failed or refused to do directly through amendment to 28 U. S. C. § 1443 also necessitates rejection of the right of removal in this case, in addition to which there are other avenues of relief open to petitioners for vindication of their federal rights that may have been or will be violated. Pp. 227–228.

488 F. 2d 284, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post,* p. 229. DOUGLAS, J., took no part in the consideration or decision of the case.

Frank R. Parker argued the cause for petitioners. With him on the brief were *J. Harold Flannery* and *Paul R. Dimond.*

Ed Davis Noble, Jr., Special Assistant Attorney General of Mississippi, argued the cause for respondents. With him on the brief were *A. F. Summer,* Attorney General, and *William A. Allain,* First Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the application of 28 U. S. C. § 1443 (1), permitting defendants in state cases to remove the proceedings to the federal district courts under certain conditions, in the light of Title I of the Civil Rights Act of 1968, § 101 (a), 82 Stat. 73, 18 U. S. C. § 245.

I

During March 1972, petitioners, six Negro citizens of Vicksburg, Miss., along with other citizens of Vicksburg, made various demands upon certain merchants and city officials generally relating to the number of Negroes employed or serving in various positions in both local government and business enterprises. In late March, petitioners began picketing some business establishments in Vicksburg and urging, by word of mouth and through leaflets, that the citizens of Vicksburg boycott those establishments until such time as petitioners' demands were realized.[1] On May 2, 13, 14, and 21 of that year, petitioners, along with 43 other Negroes, were arrested [2] on the basis of warrants charging, in general terms, their complicity in a conspiracy unlawfully to bring about a boycott of merchants and businesses.[3] At least some

[1] With respect to these business establishments, the specific demands made by the petitioners were that 40% of their employees and managers should be drawn from the Negro community.

[2] All of the petitioners were arrested on May 2, 1972; petitioners Albert Johnson, Eddie McBride, Charles Chiplin, and James Odell Dixon were arrested again on either May 13 or 14, and petitioner Johnson was arrested once again on May 21.

[3] The warrants were supported by the sworn affidavits of the Vicksburg chief of police and charged various persons among the total of 49 eventually arrested

"with the felonious intent on their part, and each of them to commit acts injurious to trade or commerce among the public and did wilfully, unlawfully, and feloniously conspire, combine, confederate

of these arrests took place at a time when some of those arrested were engaged in picketing in protest of the racial discrimination allegedly practiced by certain merchants of Vicksburg. Following the arrests, which were made by Vicksburg police officers, those arrested were transported to the city jail where they each remained after processing until the posting of bail. There is no indication in the record in this case that the arrests and subsequent detentions of petitioners or the other 43 persons so arrested and detained involved the application of any force by the arresting officers beyond the verbal directions issued by those officers and the coercive custody normally incident to arrest, processing, and detention.

On May 25, 1972, those arrested filed a petition in the Federal District Court in compliance with the procedures established by 28 U. S. C. § 1446 seeking transfer of the trial of charges against them to the District Court pursuant to 28 U. S. C. § 1443, which reads, in pertinent part,[4] as follows:

> "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

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and agree among themselves and each of them with the other, and did enter into an unlawful conspiracy, plan and design among themselves, and each with the other, to unlawfully and feloniously bring about a boycott of merchants and businesses and pursuant of the said unlawful conspiracy did then and there promote, encourage and enforce acts injurious to trade or commerce among the public."

[4] Although the petitioners pleaded § 1443 generally, they made no suggestion that any among them was in the position to claim the protection of § 1443 (2) as construed by our decision in *City of Greenwood* v. *Peacock*, 384 U. S. 808, 815–824 (1966), nor do they press such a claim in this Court.

> "(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof . . . ."

In their removal petition, it was alleged, *inter alia,* that those arrested were being prosecuted under several state conspiracy statutes [5] which were "on their face and as applied repugnant to the Constitution . . . ," and that:

> "The charges against petitioners, their arrest, and subsequent prosecution on those charges have no basis in fact and have been effectuated solely and exclusively for the purpose and effect of depriving petitioners of their Federally protected rights, including by force or threat of force, punishing, injuring, intimidating, and interferring [*sic*], or attempting to punish, injure, intimidate, . . . and interfere with petitioners, and the class of persons participating in the . . . boycott and demonstrations, for the exercise of their rights peacefully to protest discrimination and to conduct and publicize a boycott which seeks to remedy the denial of equal civil rights . . . which activities are protected by 18 U. S. C. [§] 245."

On December 29, 1972, after an evidentiary hearing was held by the District Court in which testimony was

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[5] At the time the removal petition was filed, the precise statutes under which prosecutions might eventually be brought were apparently unknown to petitioners and the other persons arrested. In their amended petition filed in the District Court, petitioners claimed that they were to be prosecuted under "[c]onspiracy statutes 2056 and all other conspiracy statutes as well as 2384.5 . . . ." The reference to "2056" is an apparent reference to § 2056 of the 1942 Code, now recodified as Miss. Code Ann. § 97–1–1 (1972). The reference to "2384.5" is an apparent reference to § 2384.5 of the 1942 Code, now recodified as Miss. Code Ann. § 97–23–83 (1972).

presented both by petitioners and the Vicksburg chief of police, who was one of the named respondents to the removal petition, the District Court remanded the prosecutions to the state courts. The Court of Appeals affirmed,[6] reasoning that § 245, as a criminal statute, "confers no rights whatsoever . . . ," 488 F. 2d 284, 287 (CA5 1974), and that, under this Court's decisions in *Georgia* v. *Rachel*, 384 U. S. 780 (1966), and *City of Greenwood* v. *Peacock*, 384 U. S. 808 (1966), a federal statute must "provide" for the equal rights of citizens before it can be invoked as a basis for removal of prosecutions under § 1443 (1). Rehearing and rehearing en banc, Fed. Rule App. Proc. 35, were denied, five Circuit Judges dissenting in an opinion.[7] 491 F. 2d 94 (CA5 1974). We granted certiorari, 419 U. S. 893 (1974), and, for reasons stated below, affirm the judgment of the Court of Appeals.

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[6] After filing a notice of appeal, petitioners applied to the District Court for a stay of its mandate remanding the prosecutions to the state courts, which stay was denied. The record does not indicate that a stay was sought at that point from the Court of Appeals, the prosecutorial process proceeding in its normal fashion until March 1973, when the grand jury having cognizance over the charges "no billed" the charges against 43 of the persons having been previously arrested. App. 140. That same grand jury at the same time returned indictments against the six remaining persons, petitioners here; two of the petitioners were indicted for violation of Miss. Code Ann. § 97-23-83 (1972), and the other four with violation of Miss. Code Ann. § 97-23-85 (1972). Tr. of Oral Arg. 26.

[7] Shortly after the Court of Appeals denied a petition for rehearing en banc, 491 F. 2d 94 (CA5 1974), that court granted an application for a stay of its mandate to petitioners for purposes of their seeking a writ of certiorari in this Court, that stay being effective until disposition of the case by this Court. Since that time the prosecution of petitioners on the indictments handed down by the grand jury has not gone forward.

II

Our most recent cases construing § 1443 (1) are the companion cases of *Georgia* v. *Rachel, supra,* and *City of Greenwood* v. *Peacock, supra.* Those cases established that a removal petition under 28 U. S. C. § 1443 (1) must satisfy a two-pronged test. First, it must appear that the right allegedly denied the removal petitioner arises under a federal law "providing for specific civil rights stated in terms of racial equality." *Georgia* v. *Rachel, supra,* at 792. Claims that prosecution and conviction will violate rights under constitutional or statutory provisions of general applicability or under statutes not protecting against racial discrimination, will not suffice. That a removal petitioner will be denied due process of law because the criminal law under which he is being prosecuted is allegedly vague or that the prosecution is assertedly a sham, corrupt, or without evidentiary basis does not, standing alone, satisfy the requirements of § 1443 (1). *City of Greenwood* v. *Peacock, supra,* at 825.

Second, it must appear, in accordance with the provisions of § 1443 (1), that the removal petitioner is "denied or cannot enforce" the specified federal rights "in the courts of [the] State." This provision normally requires that the "denial be manifest in a formal expression of state law," *Georgia* v. *Rachel, supra,* at 803, such as a state legislative or constitutional provision, " 'rather than a denial first made manifest at the trial of the case.' " *Id.,* at 799. Except in the unusual case where "an equivalent basis could be shown for an equally firm prediction that the defendant would be 'denied or cannot enforce' the specified federal rights in the state court," *id.,* at 804, it was to be expected that the protection of federal constitutional or statutory rights could be

effected in the pending state proceedings, civil or criminal. Under § 1443 (1),

> "the vindication of the defendant's federal rights is left to the state courts except in the rare situations where it can be clearly predicted by reason of the operation of a pervasive and explicit state or federal law that those rights will inevitably be denied by the very act of bringing the defendant to trial in the state court." *City of Greenwood* v. *Peacock, supra,* at 828.

In *Rachel,* the allegations of the petition for removal were held to satisfy both branches of the rule. The federal right claimed arose under §§ 201 (a) and 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a (a) and 2000a–2 (c). Section 201 (a) forbids refusals of service in, or exclusions from, public accommodations on account of race or color; and § 203 (c) prohibits any "attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 . . . ." The removal petition fairly alleged that the prosecutions sought to be removed from state court were brought and would be tried "solely as the result of peaceful attempts to obtain service at places of public accommodation." 384 U. S., at 793.[8] We concluded that if the allegations in the removal petition were true, the defendants by being prosecuted under a state criminal trespass law would be denied or could not enforce their rights in the courts of Georgia, since the "burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964." *Id.,* at 805.

In *Peacock,* on the contrary, the state-court defend-

[8] We had earlier construed § 203 (c) as prohibiting "prosecution of any person for seeking service in a covered establishment, because of his race or color." *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 311 (1964).

ants petitioning for removal were being prosecuted for obstructing public streets, assault and battery, and various other local crimes.[9] The federal rights allegedly being denied were said to arise under the Constitution as well as under 42 U. S. C. §§ 1971 and 1981, the former section guaranteeing the right to vote without discrimination on the grounds of race or color and forbidding interference therewith, and the latter guaranteeing all persons equal access to specified rights enjoyed by white persons.[10] The Court assumed that the claimed statu-

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[9] "The several defendants were charged variously with assault, interfering with an officer in the performance of his duty, disturbing the peace, creating a disturbance in a public place, inciting to riot, parading without a permit, assault and battery by biting a police officer, contributing to the delinquency of a minor, operating a motor vehicle with improper license tags, reckless driving, and profanity and use of vulgar language." 384 U. S., at 813 n. 5.

[10] Title 42 U. S. C. § 1971 reads, in pertinent part:

"(a) (1) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State . . . to the contrary notwithstanding.

. . . . . .

"(b) No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . ."

We take note of the similarity between the language of § 1971 (b) set out above and the comparable language of § 245 (b) as set out in n. 11, *infra*.

Title 42 U. S. C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject

tory rights were within those rights contemplated by § 1443 (1), but went on to hold that there had been no showing that petitioners would be denied or could not enforce their rights in the state courts. The removal petitions alleged "(1) that the defendants were arrested by state officers and charged with various offenses under state law because they were Negroes or because they were engaged in helping Negroes assert their rights under federal equal civil rights laws, and that they are completely innocent of the charges against them, or (2) that the defendants will be unable to obtain a fair trial in the state court." 384 U. S., at 826. The Court held, however, that it was not enough to support removal to allege that "federal equal civil rights have been illegally and corruptly denied by state administrative officials in advance of trial, that the charges against the defendant are false, or that the defendant is unable to obtain a fair trial in a particular state court." *Id.*, at 827. Petitioners could point to no federal law conferring on them the right to engage in the specific conduct with which they were charged; and there was no "federal statutory right that no State should even attempt to prosecute them for their conduct." *Id.*, at 826.

III

With our prior cases in mind, it is apparent, without further discussion, that removal under § 1443 (1) was not warranted here based solely on petitioners' allegations that the statutes underlying the charges against them were unconstitutional, that there was no basis in fact for those charges, or that their arrest and prosecution otherwise denied them their constitutional rights. We are also convinced for the following reasons that

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to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

§245,[11] on which petitioners principally rely, does not furnish adequate basis for removal under § 1443 (1) of these state prosecutions to the federal court.

Whether or not § 245, a federal criminal statute, provides for "specific civil rights stated in terms of racial equality . . . ," *Georgia* v. *Rachel*, 384 U. S., at 792, it

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[11] Title 18 U. S. C. § 245, in relevant part, provides:

"(b) Whoever, whether or not acting under color of law, *by force or threat of force* willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

. . . . . .

"(2) any person because of his race, color, religion or national origin and because he is or has been—

. . . . . .

"(C) applying for or enjoying employment, or any perquisite thereof, by any private employer . . .

. . . . . .

"(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

"(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in [subparagraph (2)(C)]; or

"(B) affording another person or class of persons opportunity or protection to so participate; or

"(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in [subparagraph 2 (C)], *or participating lawfully in speech or peaceful* assembly opposing any denial of the opportunity to so participate—

"shall be fined . . . ." (Emphasis added.)

This truncated quotation of § 245 merely focuses on that activity, enumerated in subparagraph (2)(C), which would appear to be most closely connected to both the activity in which some defendants were engaged when actually arrested and the activity to which the state charges most closely relate. We recognize that the defendants' picketing during the several months relevant expressed their dissatisfaction with what they contended to be racial discrimination in areas other than private employment.

evinces no intention to interfere in any manner with state criminal prosecutions of those who seek to have their cases removed to the federal courts. On the contrary, § 245 (a)(1) itself expressly provides:

> "Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State . . . from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section . . . ." [12]

The Mississippi courts undoubtedly have jurisdiction over conspiracy and boycott cases brought under state law; and § 245 (a)(1) appears to disavow any intent to interrupt such state prosecutions, a conclusion that is also implicit in the operative provisions of that section. Section 245 (b) makes it a crime for any persons, by "force or threat of force" to injure, intimidate, or interfere with any individual engaged in specified activities. The provision on its face focuses on the use of force, and its legislative history confirms that its central purpose was to prevent and punish *violent* interferences with the exercise of specified rights and that it was not aimed at interrupting or frustrating the otherwise orderly processes of state law.

Section 245, which was Title I of the Civil Rights Act of 1968, was the antidote prescribed by Congress to deter and punish those who would forcibly suppress the free exercise of civil rights enumerated in that statute. The bill which eventually became Title I, H. R. 2516, was substantially identical to H. R. 14765, passed by the

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[12] Section 245 (a)(1) goes on to negative any intent by Congress to foreclose state prosecution of the acts forbidden by that section: "nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law."

House as Title V of the Civil Rights Act of 1966.[13] Title I was enacted against a background of racial violence described in the Report of the bill that was adopted by the House:

> "The brutal crimes committed in recent years against Negroes exercising Federal rights and against white persons who have encouraged or aided Negroes seeking equality need no recital. Violence and threats of violence have been resorted to in order to punish or discourage Negroes from voting, from using places of public accommodation and public facilities, from attending desegregated schools, and from engaging in other activities protected by Federal law. Frequently the victim of the crime has recently engaged or is then engaging in the exercise of a Federal right. In other cases, the victim is a civil rights worker—white or Negro—who has encouraged others to assert these rights or engaged in peaceful assembly opposing their denial. In still other cases Negroes, not known to have had anything to do with civil rights activities, have been killed or assaulted to discourage other Negroes from asserting their rights." H. R. Rep. No. 473, 90th Cong., 1st Sess., 3–4 (1967).[14]

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[13] The Proposed Civil Rights Act of 1966, while it passed the House, did not pass the Senate.

[14] This Report stated: "The bill is intended to strengthen the Government's capability to meet the problem of civil rights violence." H. R. Rep. No. 473, p. 3. The bulk of the Report simply adopted by reference certain language that had appeared in the "Additional Views" of Chairman Celler of the House Committee on the Judiciary that had been appended to the House Report of the Civil Rights Act of 1966, H. R. Rep. No. 1678, 89th Cong., 2d Sess., pt. 2 (1966). The language quoted in the text is taken from those views of Chairman Celler as expressed in the earlier House Report and

The Senate Report likewise explained Title I as a measure "to meet the problem of violent interference, for racial or other discriminatory reasons, with a person's free exercise of civil rights." S. Rep. No. 721, 90th Cong., 1st Sess., 3 (1967). This concern with racially motivated acts of violence pervaded the report, see *id.*, at 4, 5, 6, 7, 8, and 9. In the debate on the floor of the Senate, frequent references to the bill's being directed at crimes of racial violence were made,[15] the following being particularly relevant here:

> "This new law would provide that when a law enforcement officer totally abandons his duty in order to violently intimidate individuals seeking

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as adopted by the House in the subsequent Congress. Chairman Celler made abundantly clear in those views that the bill that became § 245 "is designed to meet the problem of present-day racial violence . . . ," H. R. Rep. No. 473, *supra*, at 5, and he reiterated this view of the bill when it arrived on the House floor for consideration after finally passing the Senate in 1967:

"[The Senate version of the bill] reenacts the bill that we passed, giving protection to civil rights workers who might be endeavoring to express their beliefs in various parts of the country, and the provisions therein would protect them against violence." 114 Cong. Rec. 6490 (1968). See *id.*, at 9559.

[15] See *id.*, at 318–320, 333, 335, 399, 535, 538, 913, 928, 1391, 1392. A Department of Justice witness testifying before a Senate subcommittee in support of Title I, stated that it "would afford the Federal Government an effective means of deterring and punishing forcible interference with the exercise of Federal rights," and that "[t]he mere fact that a policeman who is performing his duty in good faith uses force does not bring him under the act at all." Hearings on the Proposed Civil Rights Act of 1967, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 82, 355 (1967). Those hearings, like the Senate Report and the floor debate in the Senate, are replete with numerous references to the use of violence to deter the exercise of federal rights. See *id.*, at 61, 81, 210–212, 222, 312, 322, 325, 349.

> lawfully to exercise certain enumerated Federal rights, he will be punished like any other citizen.
>
> . . . . .
>
> ". . . So long as it appears that an officer reasonably believed he was doing his duty, that is, that the arrest took place because of a perceived violation of a then-valid law, no case of knowing interference with civil rights could be made against him." 114 Cong. Rec. 2268 (1968).

Viewed in this context, it seems quite evident that a state prosecution, proceeding as it does in a court of law, cannot be characterized as an application of "force or threat of force" within the meaning of § 245. That section furnishes federal protection against violence in certain circumstances. But whatever "rights" it may confer, none of them is denied by a state criminal prosecution for conspiracy or boycott. Here, as in *Peacock*, there is no "federal statutory right that no State should even attempt to prosecute them for their conduct." 384 U. S., at 826.[16]

IV

We think further observations are in order. We stated in *City of Greenwood* v. *Peacock:*

> "[I]f changes are to be made in the long-settled interpretation of the provisions of this century-old removal statute, it is for Congress and not for this Court to make them. Fully aware of the established meaning the removal statute had been given by a consistent series of decisions in this Court, Congress

[16] The three Courts of Appeals faced with the issue now before us are in accord with our decision. *New York* v. *Horelick*, 424 F. 2d 697, 703 (CA2), cert. denied, 398 U. S. 939 (1970); *Hill* v. *Pennsylvania*, 439 F. 2d 1016, 1022 (CA3), cert. denied, 404 U. S. 985 (1971) (alternative holding); *Williams* v. *Tri-County Community Center*, 452 F. 2d 221, 223 (CA5 1971) (*quo warranto* proceeding).

> in 1964 declined to act on proposals to amend the law. All that Congress did was to make remand orders appealable, and thus invite a contemporary judicial consideration of the meaning of the unchanged provisions of 28 U. S. C. § 1443." *Id.*, at 834–835.

When we decided that case, there had been introduced in the Congress no fewer than 12 bills which, if enacted, would have enlarged in one way or another the right of removal in civil rights cases. *Id.*, at 833 n. 33. None of those bills was reported from the cognizant committee of Congress; none has been reported in the intervening years; and the parties have informed us of no comparable bill under active consideration in the present Congress. The absence of any evidence or legislative history indicating that Congress intended to accomplish in § 245 what it has failed or refused to do directly through amendment to § 1443 necessitates our considered rejection of the right of removal in this case. Also, as we noted in *Peacock*, there are varied avenues of relief open to these defendants for vindication of any of their federal rights that may have been or will be violated, 384 U. S., at 828–830; and, indeed, it appears from the record in this case that at least one such avenue was pursued early on by them and continues to be pursued.[17]

Affirmed.

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[17] Brief for Petitioners 16 n. 9:

"Simultaneously [with the filing of the removal petition *sub judice*], the petitioners also filed a complaint pursuant to 42 U. S. C. § 1983 seeking injunctive relief against the arrests and prosecutions in a companion action, *Concerned Citizens of Vicksburg* v. *Sills*, Civ. No. 72W–18 (N) (SD Miss. filed May 24, 1972), but the District Court denied temporary injunctive relief which would have held the prosecutions in status quo pending a final hearing on the merits (Order of May 26, 1972). A final hearing in that action has not yet been held, and is not part of this appeal."

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I believe the dissenters in *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966), correctly construed the civil rights removal statute, 28 U. S. C. § 1443. See *New York* v. *Galamison,* 342 F. 2d 255, 275 (CA2) (Marshall, J., dissenting), cert. denied, 380 U. S. 977 (1965). On that broader view of the statute, removal would plainly be proper here, and if the Federal District Court determined that the state proceedings were being used to deny federally protected rights, it would be required to dismiss the prosecution. See *City of Greenwood* v. *Peacock, supra,* at 840–848 (DOUGLAS, J., dissenting). Even under *Peacock* and its companion case, *Georgia* v. *Rachel,* 384 U. S. 780 (1966), however, I think that removal should have been available on the particular facts of this case.

As the Court today observes, *Rachel* and *Peacock* imposed sharp limitations on the scope of the removal statute. The statute was held to permit removal only in the rare case in which (1) the federal right at issue stemmed from a law providing expressly for equal civil rights; (2) the conduct with which the removal petitioners were charged was arguably protected by the federal law in question; and (3) the federal law granted the further right not only to engage in the conduct in question, but to be free from arrest and prosecution by state officials for that conduct. Focusing on the third requirement, the Court today holds that Title I of the 1968 Civil Rights Act, 18 U. S. C. § 245, does not provide a right to be free from arrest and prosecution for engaging in specific federally protected conduct. In my

view, the three requirements from *Peacock* were satisfied to the extent necessary to call for a full hearing on the removal petition, and I would therefore vacate the judgment of the Court of Appeals and remand for further proceedings.[1]

I

The Court of Appeals based its ruling on the first of the three requirements, holding that § 245 was not a "law providing for . . . equal civil rights." The court reasoned that the statute failed to meet this requirement because it did not "provide" any substantive rights but merely supplied a criminal sanction for the violation of rights that had been elsewhere created. This misses the point.[2]

Even if § 245 is regarded solely as creating criminal penalties for interference with previously established civil rights, it certainly "provid[es] for" those rights by facilitating their exercise. Congress plainly intended § 245 in part to render certain rights meaningful, even though the rights themselves had in some instances been

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[1] Although the District Court initially held a hearing on the removal petition and made various factual findings adverse to the petitioners, the Court of Appeals disposed of the case without reviewing the findings of the District Court. I would therefore remand the case to the Court of Appeals to review the findings relevant to the availability of removal and to order further proceedings if necessary.

[2] The Court of Appeals acknowledged that § 245 met the requirement that the statute under which removal is claimed be a law dealing with "specific civil rights stated in terms of racial equality," *Georgia* v. *Rachel*, 384 U. S. 780, 792 (1966). See 488 F. 2d 284, 286 (CA5 1974). The statute was plainly addressed to problems associated with the exercise and advocacy of minority rights. Like the 1964 Civil Rights Act, and unlike the more general constitutional and statutory provisions that were rejected as bases for removal in *Rachel* and *Peacock*, § 245 (b)(2) refers throughout to conduct premised on racial discrimination.

created in prior legislation. See S. Rep. No. 721, 90th Cong., 1st Sess., 4–6 (1967); H. R. Rep. No. 473, 90th Cong., 1st Sess., 5–7 (1967). If Congress had provided private legal or equitable remedies for the vindication of pre-existing rights, such a statute would certainly be deemed one "providing for" equal civil rights. The fact that Congress has invoked the criminal sanction to protect and enforce those rights rather than relying on private remedies should make no difference.

In any event, § 245 does more than enforce pre-existing rights: in several respects it creates rights that had no previous statutory recognition. First, the statute protects not only those participating in the exercise of equal civil rights, but also those "encouraging other persons to participate" and those "participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate," § 245 (b)(5). See S. Rep. No. 721, *supra*, at 4. Second, because it is based on § 5 of the Fourteenth Amendment rather than the Commerce Clause, § 245 goes beyond the specific protections of prior civil rights laws in various particulars. As the House Report noted:

> "[T]he scope of the activities described in section [245 (b)] is not limited to the scope of the 'rights' created by other Federal laws outlawing discrimination with respect to those activities. Accordingly, in appropriate cases, . . . the bill would reach forcible interference with employment, regardless of the size and regardless of the public or private character of the employer; with service in all of the described types of places of public accommodation, whether or not they happen to fall within the scope of the 1964 Civil Rights Act; and with common carrier transportation whether interstate or intrastate." H. R. Rep. No. 473, *supra*, at 5.

Finally, the statute goes beyond protecting against racially motivated misconduct by state officials and those acting in concert with them. It reaches racially motivated conduct by private individuals as well, thus extending both a right against, and a remedy for, certain private misconduct. The inclusion of private individuals within the reach of § 245 was a topic of intense dispute during the congressional debates over the statute. Both the advocates and opponents of the statute recognized that § 245 would criminalize a whole new sphere of conduct and thus significantly expand the scope of federal statutory protection for civil rights. See S. Rep. No. 721, *supra*, at 7–8, 21–26; 113 Cong. Rec. 22763–22764 (1967); 114 Cong. Rec. 319, 389–391, 539–544 (1968). In view of the statute's broad remedial purposes and effects, only on the most grudging reading can it be said not to "provid[e] for equal civil rights."

II

Although neither the Court of Appeals nor this Court has discussed the second requirement for § 1443 removal, I believe that under *Rachel* and *Peacock* a sufficient showing has been made to require further proceedings below. The Court in *Peacock* established that where the state criminal charge includes allegations of conduct clearly unprotected by federal law, removal is not available. In that case, the state charges included obstruction of the streets, assault, and interference with a police officer—all forms of conduct not even arguably protected under federal law. 384 U. S., at 826–827.[3]

[3] The Court rejected the argument made in dissent that it was the allegations in the removal petition that should be looked to in determining whether the conduct was arguably protected by federal law, not the charges filed in the state proceeding. As has been suggested elsewhere, relying on the charges to determine whether the

In *Rachel,* by contrast, the Court observed that the defendants had been charged only with violating the state criminal trespass statute, which required that a person leave a place of business when requested to do so by the owner. The defendants alleged in their removal petitions that they had remained on the premises of the privately owned restaurants where they were arrested in the course of seeking service to which they were entitled by the 1964 Civil Rights Act. Thus none of the conduct that the defendants were allegedly engaged in fell plainly outside the protection of federal law, as was the case in *Peacock.* Accordingly, the District Court was instructed to hold a hearing to determine whether the defendants were ordered to leave the restaurant facilities solely for racial reasons, and whether the conduct was in fact within the protection of federal law—in that case by determining whether the restaurants in question were within the coverage of the Civil Rights Act. 384 U. S., at 805 and n. 31.

On this point, the instant case is controlled by *Rachel* rather than *Peacock.* The arrest affidavits charged merely that the petitioners had conspired to promote a boycott of merchants and businessmen and that they had engaged in and promoted acts "injurious to trade or commerce among the public." App. 3–17. In their removal papers, the petitioners alleged that the conduct underlying their arrests on these charges was wholly within

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conduct is protected would immunize from removal any case in which the state charges included allegations of conduct plainly outside the scope of federal protection. See H. Hart & H. Wechsler, The Federal Courts and the Federal System 1228 (2d ed. 1973); *Perkins* v. *Mississippi,* 455 F. 2d 7, 11, 31–33 (CA5 1972) (Brown, C. J., dissenting); Comment, Civil Rights Removal after *Rachel* and *Peacock:* A Limited Federal Remedy, 121 U. Pa. L. Rev. 351, 368 (1972).

the protection of federal law.[4] There is nothing in the arrest affidavits or the statute under which the petitioners were charged that rebuts this claim. The line between *Rachel* and *Peacock* is that between "prosecutions in which the conduct necessary to constitute the state offense is specifically protected by a federal equal rights statute under the circumstances alleged by the petitioner, and prosecutions where the only grounds for removal are that the charge is false and motivated by a desire to discourage the petitioner from exercising or to penalize him for having exercised a federal right." *New York* v. *Davis*, 411 F. 2d 750, 754 (CA2), cert. denied, 396 U. S. 856 (1969). Like *Rachel*, this case falls into the former category. Accordingly, the courts below should determine whether the petitioners' conduct was in fact protected. If it was, the prosecutions should be dismissed.[5]

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[4] Specifically, the petitioners alleged that in order to protest various forms of private and public racial discrimination they "began to peacefully and lawfully picket the business establishment of [offending] merchants in Vicksburg, Mississippi, and began to urge the citizens of Vicksburg to boycott these business establishments. All of this picketing by the petitioners and other members of their class was done in a lawful and peaceful manner and without infringing upon the rights of any other citizen of Vicksburg . . . ." App. 22.

[5] The respondents contend in their brief that the petitioners were arrested for acts ranging from engaging in a secondary boycott to physically interfering with and intimidating a customer who was trading with a white merchant. The petitioners respond that both the arrest affidavits and the testimony at the remand hearing before the District Court were to the effect that they were all arrested pursuant to the general state conspiracy statute, and specifically for entering into "a conspiracy harmful to trade or commerce." *Id.*, at 30. Since the remand order was the only judgment before the Court of Appeals, it is not clear what effect subsequent actions taken by state officials would have on the removal suit on appeal. In any event, because of the continuing dispute over what state statute was used as the basis for the charges in state court, and correspondingly, what conduct was alleged, the question whether the conduct

III

Finally, the *Rachel-Peacock* test requires that the federal law invoked by the petitioners must do more than merely provide a defense to conviction: it must immunize them from arrest and prosecution for the conduct in question. In *Rachel,* the Court held that this test was met, since § 203 of the 1964 Civil Rights Act provided: "No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." 42 U. S. C. § 2000a–2 (c). The rights protected by § 201 included the right to "full and equal enjoyment of the . . . facilities . . . of any place of public accommodation . . . without discrimination . . . on the ground of race." 42 U. S. C. § 2000a (a). Viewing this language in light of a subsequent construction in *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 311 (1964), the Court in *Rachel* concluded that if the facts in the removal petition were found to be true, the defendants would not only be immune from conviction under the Georgia trespass statute, but they would also have a right under the Civil Rights Act of 1964 "not even to be brought to trial on these charges in the Georgia courts." 384 U. S., at 794.

The Court today distinguishes the language of 18 U. S. C. § 245 from that of § 203 (c) of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–2 (c), holding that the former does not grant the same immunity from prosecution that was implied in the latter. To me, the language of the two statutes is not sufficiently different to support such a distinction. While the statute in *Rachel* provided that no person should "punish or attempt to punish" a person engaged in conduct protected under the Act, the statute at issue here provides sanc-

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was protected under federal law is one that should be left to the courts below to determine on remand.

tions against anyone who, "whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" any person who is engaged in protected civil rights activity or is "lawfully aiding or encouraging other persons to participate" in various protected activities. The use of force or the threat of force to intimidate or interfere with persons engaged in protected activity fairly describes an "attempt to punish" the same persons, and it would seem plainly to include pretextual arrests such as are alleged to have occurred in this case.[6]

Besides the difference in language between § 203 (c) and § 245, the Court points to two other factors that it contends provide a further basis for denying removal here. I do not find either to be dispositive.

First, the Court relies on § 245 (a)(1), in which Congress emphasized that § 245 was not intended to prevent

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[6] The Court notes "the similarity between the language of § 1971 (b) . . . and the comparable language of § 245 (b)," *ante*, at 221 n. 10. The statutes do, indeed, have similar language, but the conduct protected under § 1971 (b) is *voting*, and there was no allegation in *Peacock* that the defendants were engaged in voting. It was unnecessary for the Court to determine whether § 1971 (b), or a statute with similar prohibitory language, would provide a means for removal because (1) the conduct with which the defendants were charged was not protected under *any* federal law; and (2) their conduct, as alleged in their own removal petition, was not within the scope of § 1971 (b).

Another statute, 42 U. S. C. § 1973i (b), which was enacted after the removal in *Peacock*, protected those urging others to exercise their rights to vote, and thus would have reached the conduct in which the *Peacock* defendants claimed to have been engaged. See *Whatley* v. *City of Vidalia*, 399 F. 2d 521 (CA5 1968). Even under that statute, however, removal would not have been available in *Peacock* because the conduct with which the defendants were charged in the state-court proceeding was unprotected by that or any other federal law.

"any State . . . from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section . . . ." The Court argues that this "nonpreemption" provision indicates that § 245 "appears to disavow any intent to interrupt . . . state prosecutions [for offenses such as boycotting and conspiracy]." *Ante*, at 224. I cannot agree that § 245 (a)(1) means to do that much. The legislative history of this subsection indicates that it was intended to avoid the risk that § 245 would be read to bar or interfere with state prosecutions of those who violated § 245 as well as parallel state laws. The fear was that § 245, because of its potential breadth, might appear to give pre-emptive authority to federal law officers in prosecuting a broad spectrum of offenses that were traditionally subject to local criminal jurisdiction.[7] There is no indication in the legislative history

[7] Section 245 (a)(1) had its origin in an amendment offered to the House bill by Representative Whitener. In his words, the amendment was intended to ensure:

"[N]othing contained in this act shall indicate an intent on the part of Congress to occupy the field in which any provision of the act operates to the exclusion of State laws on the same subject matter, nor shall any provision of this act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this act or any provision thereof. . . . Without the amendment, there would be an unwarranted deprivation of criminal jurisdiction now exercised by the several States in most of the fields of criminal law touched by this bill." 113 Cong. Rec. 22745 (1967).

See also *id.*, at 22683 (Rep. Whitener).

In the Senate, the final language of § 245 (a)(1) was adopted as part of Senator Dirksen's amendment to the bill. The explanation of the provision given to the Senate was as follows:

"Section (a) of the bill expresses the intent of Congress not to supersede state and local law enforcement except where required by the public interest in order to obtain substantial justice. In all cases state and local law would continue to apply, and would not be preempted by federal law. However, in those situations when

that § 245 (a)(1) was intended to defeat removal of state prosecutions by those protected under the Act, nor is there any suggestion that it was meant to reduce the protection for the beneficiaries of § 245 in any other way.

Second, the Court relies heavily on the main purpose of § 245: to penalize violent interference with the exercise of specific rights. Certainly, violent interference with the exercise of civil rights was a primary target of the statute. But curbing private violence was not the drafters' sole aim. The Act was intended to reach law enforcement officers as well as private citizens, and the process of arrest and prosecution in state courts is precisely the means by which state officials, acting under color of state law, can most plausibly exert force or the threat of force to interfere with federally protected rights. See *Perkins* v. *Mississippi*, 455 F. 2d 7, 11, 39–41 (CA5 1972) (Brown, C. J., dissenting).

The Court is correct, of course, in noting that Congress did not expressly indicate that § 245 should be available as a means of removing prosecutions to federal courts. But the Court in *Rachel* did not require any showing that Congress had specifically intended the statute in issue to be used as a vehicle for removal. All that was necessary was that the statute protect against the institution of criminal actions against those engaged in protected federal rights, and in my view that standard is met here.[8]

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state and local law enforcement is unable or unwilling to prosecute effectively, federal prosecution may be undertaken. To assure that decisions relating to exercise of this dual jurisdiction are carefully made, the bill requires advance certification of prosecutorial authority by the Attorney General or the Deputy Attorney General." 114 Cong. Rec. 4907 (1968).

[8] In its analysis, the Court relies in part on a statement by Senator Kennedy to the effect that a state law enforcement officer reasonably believing that he is doing his duty, would not violate § 245, which requires at least knowing interference with civil rights. The

IV

If the facts of this case are as alleged in the removal petition, then the protest effort of the petitioners and their group, although well within the protection of federal law, has been muffled, if not altogether stilled, by discriminatory and cynical misuse of the state criminal process. The Court makes reference to the possibility of federal injunctive relief, which would be available in this case if the petitioners can show that the arrests and prosecutions were instituted in bad faith or for the purpose of harassment. See *Dombrowski* v. *Pfister,* 380 U. S. 479, 482, 490 (1965); *Younger* v. *Harris,* 401 U. S. 37, 47–50 (1971). I only hope that the recent instances in which this Court has emphasized the values of comity and federalism in restricting the issuance of federal injunctions against state criminal and quasi-criminal proceedings will not mislead the district courts into forgetting that at times these values must give way to the need to protect federal rights from being irremediably trampled. The possibility that the petitioners might be vindicated in state-court criminal actions or through subsequent habeas corpus relief will do little to restore what has been lost: the right to engage in legitimate, if unpopular, protest without being subjected to the inconvenience, the expense, and the ignominy of arrest and prosecution. If the federal courts abandon persons like the petitioners in this case without a fair hearing on the merits of their claims, then in my view comity will have been bought at too great a cost.

I respectfully dissent.

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interference alleged in the removal petition, however, is intentional interference, which would fall within the literal terms of the statute.

ALYESKA PIPELINE SERVICE CO. *v.* WILDERNESS SOCIETY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–1977. Argued January 22, 1975—Decided May 12, 1975

Under the "American Rule" that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization, respondents, which had instituted litigation to prevent issuance of Government permits required for construction of the trans-Alaska oil pipeline, cannot recover attorneys' fees from petitioner based on the "private attorney general" approach erroneously approved by the Court of Appeals, since only Congress, not the courts, can authorize such an exception to the American rule. Pp. 247–271.

161 U. S. App. D. C. 446, 495 F. 2d 1026, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., *post*, p. 271, and MARSHALL, J., *post*, p. 272, filed dissenting opinions. DOUGLAS and POWELL, JJ., took no part in the consideration or decision of the case.

Robert E. Jordan III argued the cause for petitioner. With him on the brief were *Paul F. Mickey, James H. Pipkin, Jr.*, and *John D. Knodell, Jr.*

Dennis J. Flannery argued the cause for respondents. With him on the brief were *Joseph Onek, John F. Dienelt*, and *Thomas B. Stoel, Jr.**

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*Briefs of *amici curiae* urging affirmance were filed by *June Resnick German, Haynes N. Johnson*, and *Nicholas A. Robinson* for the Association of the Bar of the City of New York; by *Armand Derfner, Albert E. Jenner, Jr., Nicholas deB. Katzenbach, Elliot L. Richardson, Bernard G. Segal, Whitney North Seymour, E. Barrett Prettyman, Jr., David S. Tatel, J. Harold Flannery*, and *Paul Dimond* for the Lawyers' Committee for Civil Rights Under Law; by

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation was initiated by respondents Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth in an attempt to prevent the issuance of permits by the Secretary of the Interior which were required for the construction of the trans-Alaska oil pipeline. The Court of Appeals awarded attorneys' fees to respondents against petitioner Alyeska Pipeline Service Co. based upon the court's equitable powers and the theory that respondents were entitled to fees because they were performing the services of a "private attorney general." Certiorari was granted, 419 U. S. 823 (1974), to determine whether this award of attorneys' fees was appropriate. We reverse.

I

A major oil field was discovered in the North Slope of Alaska in 1968.[1] In June 1969, the oil companies constituting the consortium owning Alyeska[2] submitted an

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Jack Greenberg, James M. Nabrit III, Eric Schnapper, and *Charles Stephen Ralston* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Henry Geller* and *Abraham S. Goldstein* for the Center for Law in the Public Interest.

[1] For a discussion and chronology of the events surrounding this litigation, see Dominick & Brody, The Alaska Pipeline: *Wilderness Society* v. *Morton* and the Trans-Alaska Pipeline Authorization Act, 23 Am. U. L. Rev. 337 (1973).

[2] In 1968, Atlantic Richfield Co., Humble Oil & Refining Co., and British Petroleum Corp. formed the Trans-Alaska Pipeline System, and it was this entity which submitted the applications for the permits. Federal Task Force on Alaskan Oil Development: A Preliminary Report to the President (1969), in App. 80; Dominick & Brody, *supra,* n. 1, at 337–338, n. 3. In 1970, the Trans-Alaska Pipeline System was replaced by petitioner Alyeska. Alyeska's stock is owned by ARCO Pipeline Co., Sohio Pipeline Co., Humble Pipeline Co., Mobil Pipeline Co., Phillips Petroleum Co., Amerada Hess

application to the Department of the Interior for rights-of-way for a pipeline that would transport oil from the North Slope across land in Alaska owned by the United States,[3] a major part of the transport system which would carry the oil to its ultimate markets in the lower 48 States. A special interdepartmental task force studied the proposal and reported to the President. Federal Task Force on Alaskan Oil Development: A Preliminary Report to the President (1969), in App. 78–89. An amended application was submitted in December 1969, which requested a 54-foot right-of-way, along with applications for "special land use permits" asking for additional space alongside the right-of-way and for the construction of a road along one segment of the pipeline.[4]

Respondents brought this suit in March 1970, and sought declaratory and injunctive relief against the Secretary of the Interior on the grounds that he intended to issue the right-of-way and special land-use permits in violation of § 28 of the Mineral Leasing Act of 1920, 41 Stat. 449, as amended, 30 U. S. C. § 185,[5] and without

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Corp., and Union Oil Co. of California. See *id.*, at 338 n. 3; App. 105.

[3] The application requested a primary right-of-way of 54 feet, an additional parallel, adjacent right-of-way for construction purposes of 46 feet, and another right-of-way of 100 feet for a construction road between Prudhoe Bay on the North Slope to the town of Livengood, a distance slightly less than half the length of the proposed pipeline. See *Wilderness Society* v. *Morton*, 156 U. S. App. D. C. 121, 128, 479 F. 2d 842, 849 (1973).

[4] The amended application asked for a single 54-foot right-of-way, a special land-use permit for an additional 11 feet on one side and 35 feet on the other side of the right-of-way, and another special land-use permit for a space 200 feet in width between Prudhoe Bay and Livengood. *Id.*, at 128–129, 479 F. 2d, at 849–850; App. 89–98.

[5] Title 30 U. S. C. § 185 provided in pertinent part:

"Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the

compliance with the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*[6] On the basis of both the Mineral Leasing Act and the NEPA, the District Court granted a preliminary injunction against issuance of the right-of-way and permits. 325 F. Supp. 422 (DC 1970).

Subsequently the State of Alaska and petitioner Alyeska were allowed to intervene.[7] On March 20, 1972, the Interior Department released a six-volume Environmental Impact Statement and a three-volume Economic

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Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the [prescribed] qualifications . . . to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: . . . *Provided further,* That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding."

[6] The Court of Appeals described the heart of respondents' NEPA contention to be that the Secretary did not adequately consider the alternative of a trans-Canada pipeline. 156 U. S. App. D. C., at 166–168, 479 F. 2d, at 887–889.

[7] The interventions occurred in September 1971, approximately 17 months after the District Court had granted the preliminary injunction preventing issuance of the right-of-way and permits by the Secretary.

and Security Analysis.[8] After a period of time set aside for public comment, the Secretary announced that the requested permits would be granted to Alyeska. App. 105–138. Both the Mineral Leasing Act and the NEPA issues were at that point fully briefed and argued before the District Court. That court then decided to dissolve the preliminary injunction, to deny the permanent injunction, and to dismiss the complaint.[9]

Upon appeal, the Court of Appeals for the District of Columbia Circuit reversed, basing its decision solely on the Mineral Leasing Act. 156 U. S. App. D. C. 121, 479 F. 2d 842 (1973) (en banc). Finding that the NEPA issues were very complex and important, that deciding them was not necessary at that time since pipeline construction would be enjoined as a result of the violation of the Mineral Leasing Act, that they involved issues of fact still in dispute, and that it was desirable to expedite its decision as much as possible, the Court of Appeals declined to decide the merits of respondents' NEPA contentions which had been rejected by the District Court.[10] Certiorari was denied here. 411 U. S. 917 (1973).

Congress then enacted legislation which amended the Mineral Leasing Act to allow the granting of the permits sought by Alyeska[11] and declared that no further action

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[8] The Department of the Interior had released a draft impact statement in January 1971.

[9] The decision is not reported. See *id.*, at 130, 479 F. 2d, at 851.

[10] At the same time, the Court of Appeals upheld the grant of certain rights-of-way to the State of Alaska. *Id.*, at 158–163, 479 F. 2d, at 879–884. It also considered a challenge to a special land-use permit issued by the Forest Supervisor to Alyeska's predecessor, but did not find the issue ripe for adjudication. *Id.*, at 163–166, 479 F. 2d, at 884–887.

[11] Pub. L. 93–153, Tit. I, § 101, 87 Stat. 576, 30 U. S. C. § 185 (1970 ed., Supp. III).

under the NEPA was necessary before construction of the pipeline could proceed.[12]

With the merits of the litigation effectively terminated by this legislation, the Court of Appeals turned to the questions involved in respondents' request for an award of attorneys' fees.[13] 161 U. S. App. D. C. 446, 495 F. 2d 1026 (1974) (en banc). Since there was no applicable statutory authorization for such an award, the court proceeded to consider whether the requested fee award fell within any of the exceptions to the general "American rule" that the prevailing party may not recover attorneys' fees as costs or otherwise. The exception for an award against a party who had acted in bad faith was inapposite, since the position taken by the federal and state parties and Alyeska "was manifestly reasonable and assumed in good faith . . . ." *Id.*, at 449, 495 F. 2d, at 1029. Application of the "common benefit" exception which spreads the cost of litigation to those persons benefiting from it would "stretch it totally outside its basic rationale . . . ." *Ibid.*[14] The Court of Appeals nevertheless held that respondents had acted to vindicate "important statutory rights of all citizens . . . ," *id.*, at 452, 495 F. 2d, at 1032; had ensured that the governmental system functioned properly; and were entitled to attorneys' fees lest the great cost of litigation of this kind, particularly against well-financed defendants such as

[12] Trans-Alaska Pipeline Authorization Act, Pub. L. 93–153, Tit. II, 87 Stat. 584, 43 U. S. C. § 1651 *et seq.* (1970 ed., Supp. III).

[13] Respondents' bill of costs includes a total of 4,455 hours of attorneys' time spent on the litigation. App. 209–219.

[14] "[T]his litigation may well have provided substantial benefits to particular individuals and, indeed, to every citizen's interest in the proper functioning of our system of government. But imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries . . . ." 161 U. S. App. D. C., at 449, 495 F. 2d, at 1029.

Alyeska, deter private parties desiring to see the laws protecting the environment properly enforced. Title 28 U. S. C. § 2412 [15] was thought to bar taxing any attorneys' fees against the United States, and it was also deemed inappropriate to burden the State of Alaska with any part of the award.[16] But Alyeska, the Court of Appeals held, could fairly be required to pay one-half of the full award to which respondents were entitled for having performed the functions of a private attorney general. Observing that "[t]he fee should represent the reasonable value of the services rendered, taking into account all the surrounding circumstances, including, but not limited to, the time and labor required on the case, the benefit to the public, the skill demanded by the novelty or complexity of the issues, and the incentive factor," 161 U. S. App. D. C., at 456, 495 F. 2d, at 1036, the Court of Appeals remanded the case to the District Court for assessment of the dollar amount of the award.[17]

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[15] See n. 40, *infra*.

[16] "In the circumstances of this case it would be inappropriate to tax fees against appellee State of Alaska. The State voluntarily participated in this suit, in effect to present to the court a different version of the public interest implications of the trans-Alaska pipeline. Taxing attorneys' fees against Alaska would in our view undermine rather than further the goal of ensuring adequate spokesmen for public interests." 161 U. S. App. D. C., at 456 n. 8, 495 F. 2d, at 1036 n. 8.

[17] The Court of Appeals also directed that "[t]he fee award need not be limited . . . to the amount actually paid or owed by [respondents]. It may well be that counsel serve organizations like [respondents] for compensation below that obtainable in the market because they believe the organizations further a public interest. Litigation of this sort should not have to rely on the charity of counsel any more than it should rely on the charity of parties volunteering to serve as private attorneys general. The attorneys who worked on this case should be reimbursed the reasonable value of

II

In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this "American Rule"; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.

At common law, costs were not allowed; but for centuries in England there has been statutory authorization to award costs, including attorneys' fees. Although the matter is in the discretion of the court, counsel fees are regularly allowed to the prevailing party.[18]

During the first years of the federal-court system, Congress provided through legislation that the federal courts were to follow the practice with respect to awarding

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their services, despite the absence of any obligation on the part of [respondents] to pay attorneys' fees." *Id.*, at 457, 495 F. 2d, at 1037.

[18] "As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special 'taxing Masters' in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967) (footnotes omitted). See generally Goodhart, Costs, 38 Yale L. J. 849 (1929); C. McCormick, Law of Damages 234–236 (1935).

attorneys' fees of the courts of the States in which the federal courts were located,[19] with the exception of district courts under admiralty and maritime jurisdiction

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[19] The Federal Judiciary Act of Sept. 24, 1789, 1 Stat. 73, touched upon costs in §§ 9, 11–12, 20–23, but as to counsel fees provided specifically only that the United States Attorney in each district "shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be." § 35. Five days later, however, Congress enacted legislation regulating federal-court processes, which provided:

"That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided . . . rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And . . . [in causes of equity and of admiralty and maritime jurisdiction] the rates of fees [shall be] the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes." Act of Sept. 29, 1789, § 2, 1 Stat. 93.

That legislation was to be in effect only until the end of the next congressional session, § 3, but it was extended twice. See Act of May 26, 1790, c. 13, 1 Stat. 123; Act of Feb. 18, 1791, c. 8, 1 Stat. 191. It was repealed, however, by legislation enacted on May 8, 1792, § 8, 1 Stat. 278.

Prior to the time of that repeal, other legislation had been passed providing for additional compensation for United States Attorneys to cover traveling expenses. Act of Mar. 3, 1791, c. 22, § 1, 1 Stat. 216. That legislation was also repealed by the Act of May 8, 1792, *supra*. The latter enactment substituted a new provision for the compensation of United States Attorneys; they would be entitled to "such fees in each state respectively as are allowed in the supreme courts of the same . . ." plus certain traveling expenses, § 3, 1 Stat. 277. That provision was repealed on February 28, 1799. § 9, 1 Stat. 626. That same statute provided new, specific rates of compensation for United States Attorneys. See § 4. See also § 5.

On March 1, 1793, Congress enacted a general provision governing the awarding of costs to prevailing parties in federal courts:

"That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour of the parties obtaining judg-

which were to follow a specific fee schedule.[20] Those statutes, by 1800, had either expired or been repealed.

In 1796, this Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts. In *Arcambel* v. *Wiseman*, 3 Dall. 306, the inclusion of attorneys' fees as damages[21] was overturned on the ground that "[t]he general practice of the *United States* is in oposition [*sic*] to it; and even if that practice

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ments therein, such compensation for their travel and attendance, and for attornies and counsellors' fees, except in the district courts in cases of admiralty and maritime jurisdiction, as are allowed in the supreme or superior courts of the respective states." § 4, 1 Stat. 333.

This provision was to be in force for one year and then to the end of the next session of Congress, § 5, but it was continued in effect in 1795, Act of Feb. 25, 1795, c. 28, 1 Stat. 419, and again in 1796, Act of Mar. 31, 1796, 1 Stat. 451, for a period of two years and then until the end of the next session of Congress; at that point, it expired.

After 1799 and until 1853, no other congressional legislation dealt with the awarding of attorneys' fees in federal courts except for the Act of 1842, n. 23, *infra*, which gave this Court authority to prescribe taxable attorneys' fees, and for legislation dealing with the compensation for United States Attorneys. See the Act of Mar. 3, 1841, 5 Stat. 427, and the Act of May 18, 1842, 5 Stat. 483. See the summary of the legislation dealing with costs throughout this period, in S. Law, The Jurisdiction and Powers of the United States Courts 255–282 (1852).

[20] By the legislation of September 29, 1789, the federal courts were to follow the state practice with respect to rates of fees under admiralty and maritime jurisdiction. See n. 19, *supra*. The Act of Mar. 1, 1793, § 1, 1 Stat. 332, established set fees for attorneys in the district courts in admiralty and maritime proceedings. As with § 4 of that Act, n. 19, *supra*, this provision had expired by the end of the century. See *The Baltimore*, 8 Wall. 377, 390–392 (1869).

[21] The Circuit Court had allowed $1,600 in counsel fees under its estimate of damages and $28.89 as costs. Record in *Arcambel* 56.

were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." This Court has consistently adhered to that early holding. See *Day* v. *Woodworth*, 13 How. 363 (1852); *Oelrichs* v. *Spain*, 15 Wall. 211 (1872); *Flanders* v. *Tweed*, 15 Wall. 450 (1873); *Stewart* v. *Sonneborn*, 98 U. S. 187 (1879); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717–718 (1967); *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co., Inc.*, 417 U. S. 116, 126–131 (1974).

The practice after 1799 and until 1853 continued as before, that is, with the federal courts referring to the state rules governing awards of counsel fees, although the express legislative authorization for that practice had expired.[22] By legislation in 1842, Congress did give this Court authority to prescribe the items and amounts of costs which could be taxed in federal courts, but the Court took no action under this statutory mandate.[23]

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[22] See 2 T. Street, Federal Equity Practice § 1986, pp. 1188–1189 (1909); Law, *supra*, n. 19, at 279; Costs in Civil Cases, 30 F. Cas. 1058 (No. 18,284) (CCSDNY 1852).

[23] "That, for the purpose of further diminishing the costs and expenses in suits and proceedings in the said courts, the Supreme Court shall have full power and authority, from time to time, to make and prescribe regulations to the said district and circuit courts, as to the taxation and payment of costs in all suits and proceedings therein; and to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other officers serving process, to witnesses, and to all other persons whose services are usually taxable in bills of costs. And the items so stated in the said table, and none others, shall be taxable or allowed in bills of costs; and they shall be fixed as low as they reasonably can be, with a due regard to the nature of the duties and services which shall be performed by the various officers and persons aforesaid, and shall in no case exceed the costs and expenses now authorized, where the

See S. Law, The Jurisdiction and Powers of the United States Courts 271 n. 1 (1852).

In 1853, Congress undertook to standardize the costs allowable in federal litigation. In support of the proposed legislation, it was asserted that there was great diversity in practice among the courts and that losing litigants were being unfairly saddled with exorbitant fees for the victor's attorney.[24] The result was a far-reaching

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same are provided for by existing laws." Act of Aug. 23, 1842, § 7, 5 Stat. 518.

The brief legislative history of this section indicates that, as its own language states, its purpose was to reduce fee-bills in federal courts. Cong. Globe, 27th Cong., 2d Sess., 723 (1842) (remarks of Sen. Berrien). One of its opponents, Senator Buchanan, said the following:

"If Congress conforms the fee-bills of the courts over which it has control, to the fee-bills of the State courts, that is all that can be expected of it . . . . But the great and main objection was, its transfer of the legislative power of Congress to the Supreme Court." *Ibid.*

[24] See the remarks of Senator Bradbury, Cong. Globe App., 32d Cong., 2d Sess., 207 (1853):

"There is now no uniform rule either for compensating the ministerial officers of the courts, or for the regulation of the costs in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings. . . . It will hence be seen that the compensation of the officers, and the costs taxed in civil suits, is made to depend in a great degree on that allowed in the State courts. There are no two States where the allowance is the same.

"When this system was adopted, it had the semblance of equality, which does not now exist. There were then but sixteen States, in all of which the laws prescribed certain taxable costs to attorneys for the prosecution and defense of suits. In several of the States which have since been added to the Union, no such cost is allowed; and in others the amount is inconsiderable. As the State fee bills are made so far the rule of compensation in the Federal courts, the Senate will

Act specifying in detail the nature and amount of the taxable items of cost in the federal courts. One of its purposes was to limit allowances for attorneys' fees that were to be charged to the losing parties. Although the Act disclaimed any intention to limit the amount of fees that an attorney and his client might agree upon between themselves, counsel fees collectible from the losing party were expressly limited to the amounts stated in the Act:

> "That in lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, to United States district attorneys, clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government,

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perceive that totally different systems of taxation prevail in the different districts. . . . It is not only the officers of the courts, but the suitors also, that are affected by the present unequal, extravagant, and often oppressive system.

. . . . . .

"The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed. . . .

. . . . . .

"It is to correct the evils and remedy the defects of the present system, that the bill has been prepared and passed by the House of Representatives. It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed. . . ."

See also H. R. Rep. No. 50, 32d Cong., 1st Sess. (1852); 2 Street, *supra*, n. 22, § 1987, p. 1189.

> such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." Act of Feb. 26, 1853, 10 Stat. 161.

The Act then proceeds to list specific sums for the services of attorneys, solicitors, and proctors.[25]

The intention of the Act to control the attorneys' fees recoverable by the prevailing party from the loser was repeatedly enforced by this Court. In *The Baltimore*, 8 Wall. 377 (1869), a $500 allowance for counsel was set aside, the Court reviewing the history of costs in the United States courts and concluding:

> "Fees and costs, allowed to the officers therein named, are now regulated by the act of the 26th of February, 1853, which provides, in its 1st section, that in lieu of the compensation now allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed.
>
> "Attorneys, solicitors, and proctors may charge their

[25] "*Fees of Attorneys, Solicitors, and Proctors.* In a trial before a jury, in civil and criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars: *Provided*, That in cases in admiralty and maritime jurisdiction, where the libellant shall recover less than fifty dollars, the docket fee of his proctor shall be but ten dollars.

"In cases at law, where judgment is rendered without a jury, ten dollars, and five dollars where a cause is discontinued.

"For scire facias and other proceedings on recognizances, five dollars.

"For each deposition taken and admitted as evidence in the cause, two dollars and fifty cents.

"A compensation of five dollars shall be allowed for the services rendered in cases removed from a district to a circuit court by writ of error or appeal. . . ." 10 Stat. 161–162.

> clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars on a final hearing in admiralty, if the libellant recovers fifty dollars, but if he recovers less than fifty dollars, the docket fee of the proctor shall be but ten dollars." *Id.*, at 392 (footnotes omitted).

In *Flanders* v. *Tweed*, 15 Wall. 450 (1872), a counsel's fee of $6,000 was included by the jury in the damages award. The Court held the Act forbade such allowances:

> "Fees and costs allowed to officers therein named are now regulated by the act of Congress passed for that purpose, which provides in its first section, that, in lieu of the compensation previously allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed. Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars in a trial before a jury, but they are restricted to a charge of ten dollars in cases at law, where judgment is rendered without a jury." *Id.*, at 452–453 (footnote omitted).

See also *In re Paschal*, 10 Wall. 483, 493–494 (1871).

Although, as will be seen, Congress has made specific provision for attorneys' fees under certain federal stat-

utes, it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute. The 1853 Act was carried forward in the Revised Statutes of 1874 [26] and by the Judicial Code of 1911.[27] Its substance, without any apparent intent to change the controlling rules, was also included in the Revised Code of 1948 as 28 U. S. C. §§ 1920 [28] and 1923 (a).[29] Under § 1920, a court may tax as costs the

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[26] "The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties." Rev. Stat. § 823. For the schedule of fees, see § 824. The schedule remained the same as the one in the 1853 Act, n. 25, *supra*.

[27] Revised Stat. §§ 823 and 824 were not repealed by the Judicial Code of 1911 and hence were to "remain in force with the same effect and to the same extent as if this Act had not been passed." § 297, 36 Stat. 1169. When the Judicial Code was included under Title 28 of the United States Code in 1926, these sections appeared as §§ 571 and 572 with but minor changes in wording, including the deletion from the latter section of the compensation for services rendered in a case which went to the circuit court on appeal or writ of error.

[28] "A judge or clerk of any court of the United States may tax as costs the following:

. . . . . .

"(5) Docket fees under section 1923 of this title." 28 U. S. C. § 1920 (1946 ed., Supp. II).

[29] "(a) Attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows:

"$20 on trial or final hearing in civil, criminal or admiralty cases,

various items specified, including the "docket fees" under § 1923 (a). That section provides that "[a]ttorney's and proctor's docket fees in courts of the United States may

except that in cases of admiralty and maritime jurisdiction where the libellant recovers less than $50 the proctor's docket fee shall be $10;

"$20 in admiralty appeals involving not over $1,000;

"$50 in admiralty appeals involving not over $5,000;

"$100 in admiralty appeals involving more than $5,000;

"$5 on discontinuance of a civil action;

"$5 on motion for judgment and other proceedings on recognizances;

"$2.50 for each deposition admitted in evidence." 28 U. S. C. § 1923 (a) (1946 ed., Supp. II).

The 1948 Code does not contain the language used in the 1853 Act and carried on for nearly 100 years that the fees prescribed by the statute "and no other compensation shall be taxed and allowed," but nothing in the 1948 Code indicates a congressional intention to depart from that rule. The Reviser's Note to the new § 1923 states only that the "[s]ection consolidates sections 571, 572, and 578 of title 28, U. S. C., 1940 ed." Section 571 was the provision limiting awards to the fees prescribed by § 572. See n. 27, *supra*. Our conclusion that the 1948 Code did not change the longstanding rule limiting awards of attorneys' fees to the statutorily provided amounts is consistent with our established view that "the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification. Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.'" *Tidewater Oil Co.* v. *United States*, 409 U. S. 151, 162 (1972) (footnote omitted). As MR. JUSTICE MARSHALL noted for the Court, *id.*, at 162 n. 29, the Senate Report covering the new Code observed that "great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval." S. Rep. No. 1559, 80th Cong., 2d Sess., 2 (1948).

The Reviser's Note to § 1920 explains the shift from the mandatory "shall be taxed" to the discretionary "may be taxed" as made "in view of Rule 54 (d) of the Federal Rules of Civil Procedure, providing for allowance of costs to the prevailing party as of course 'unless the court otherwise directs.'" Note following 28 U. S. C. § 1920 (1946 ed., Supp. II).

be taxed as costs as follows . . . ." Against this background, this Court understandably declared in 1967 that with the exception of the small amounts allowed by § 1923, the rule "has long been that attorney's fees are not ordinarily recoverable . . . ." *Fleischmann Distilling Corp.*, 386 U. S., at 717. Other recent cases have also reaffirmed the general rule that, absent statute or enforceable contract, litigants pay their own attorneys' fees. See *F. D. Rich Co.*, 417 U. S., at 128–131; *Hall* v. *Cole*, 412 U. S. 1, 4 (1973).

To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums permitted by § 1923. In *Trustees* v. *Greenough*, 105 U. S. 527 (1882), the 1853 Act was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit.[30] That rule has been con-

[30] Mr. Justice Bradley, writing for the Court in *Greenough*, said the following of the 1853 Act:

"The fee-bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other expenses and charges as between solicitor and client, nor the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of Feb. 26, 1853, c. 80, 10 Stat. 161; Rev. Stat., sect. 823. And the act contains nothing which can be fairly construed to deprive the Court of

sistently followed. *Central Railroad & Banking Co.* v. *Pettus,* 113 U. S. 116 (1885); *Harrison* v. *Perea,* 168 U. S. 311, 325–326 (1897); *United States* v. *Equitable Trust Co.,* 283 U. S. 738 (1931); *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939); *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970); *Hall* v. *Cole, supra;* cf. *Hobbs* v. *McLean,* 117 U. S. 567, 581–582 (1886). See generally Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597 (1974). Also, a court may assess attorneys' fees for the "willful disobedience of a court order . . . as part of the fine to be levied on the defendant[,] *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 426–428 (1923)," *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 718; or when the losing party has "acted in bad faith,

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Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund." 105 U. S., at 535–536.

Sprague v. *Ticonic National Bank,* 307 U. S. 161, 165 n. 2 (1939), might be read as suggesting that the Court in *Greenough* said that a federal court could tax against the losing party "solicitor and client" costs in excess of the amounts prescribed by the 1853 Act. But any such suggestion is without support either in the opinion in *Greenough,* which was limited to a common-fund rationale, or in the express terms of the statute. Those costs were simply left unregulated by the federal statute; it did not permit taxing the "client-solicitor" costs against the client's adversary. See *The Baltimore,* 8 Wall. 377 (1869); *Flanders* v. *Tweed,* 15 Wall. 450 (1872); 1 R. Foster, Federal Practice §§ 328–330 (1901); A. Conkling, The Organization, Jurisdiction and Practice of the Courts of the United States 456–457 (5th ed. 1870); A. Boyce, A Manual of the Practice in the Circuit Courts 72 (1869). Cf. *United States* v. *One Package of Ready-Made Clothing,* 27 F. Cas. 310, 312 (No. 15,950) (CCSDNY 1853). MR. JUSTICE MARSHALL's reliance upon *Sprague* for the proposition that "client-solicitor" costs could be taxed against the client's opponent, see *post,* at 278–279, is thus misplaced and conflicts with any fair reading of *Greenough, supra,* and the 1853 Act.

vexatiously, wantonly, or for oppressive reasons . . . ." *F. D. Rich Co.*, 417 U. S., at 129 (citing *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962)); cf. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 580 (1946). These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here.[31] The Court of

[31] A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." 6 J. Moore, Federal Practice ¶ 54.77 [2], pp. 1712–1713 (2d ed. 1974) (footnotes omitted). See also 2 S. Speiser, Attorneys' Fees §§ 14:3, 14:4 (1973) (hereinafter Speiser); Annotation, Prevailing Party's Right to Recover Counsel Fees in Federal Courts, 8 L. Ed. 2d 894, 900–901. Prior to the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." *People of Sioux County* v. *National Surety Co.*, 276 U. S. 238, 243 (1928). The limitations on the awards of attorneys' fees by federal courts deriving from the 1853 Act were found not to bar the award. *Id.*, at 243–244. We see nothing after *Erie* requiring a departure from this result. See *Hanna* v. *Plumer*, 380 U. S. 460, 467–468 (1965). The same would clearly hold for a judicially created rule, although the question of the proper rule to govern in awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule. See 1 Speiser §§ 12:3, 12:4.

Appeals expressly disclaimed reliance on any of them. See *supra*, at 245.

Congress has not repudiated the judicially fashioned exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors.[32] Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.[33] These statu-

[32] See nn. 26–29, *supra*.

[33] See Amendments to Freedom of Information Act, Pub. L. 93–502, § 1 (b)(2), 88 Stat. 1561 (amending 5 U. S. C. § 552 (a)); Packers and Stockyards Act, 42 Stat. 166, 7 U. S. C. § 210 (f); Perishable Agricultural Commodities Act, 46 Stat. 535, 7 U. S. C. § 499g (b); Bankruptcy Act, 11 U. S. C. §§ 104 (a)(1), 641–644; Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Unfair Competition Act, 39 Stat. 798, 15 U. S. C. § 72; Securities Act of 1933, 48 Stat. 82, as amended, 48 Stat. 907, 15 U. S. C. § 77k (e); Trust Indenture Act, 53 Stat. 1176, 15 U. S. C. § 77www (a); Securities Exchange Act of 1934, 48 Stat. 890, 897, as amended, 15 U. S. C. §§ 78i (e), 78r (a); Truth in Lending Act, 82 Stat. 157, 15 U. S. C. § 1640 (a); Motor Vehicle Information and Cost Savings Act, Tit. IV, § 409 (a)(2), 86 Stat. 963, 15 U. S. C. § 1989 (a)(2) (1970 ed., Supp. II); 17 U. S. C. § 116 (copyrights); Organized Crime Control Act of 1970, 18 U. S. C. § 1964 (c); Education Amendments of 1972, § 718, 86 Stat. 369, 20 U. S. C. § 1617 (1970 ed., Supp. II); Norris-LaGuardia Act, § 7 (e), 47 Stat. 71, 29 U. S. C. § 107 (e); Fair Labor Standards Act, § 16 (b), 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b); Longshoremen's and Harbor Workers' Compensation Act, § 28, 44 Stat. 1438, as amended, 86 Stat. 1259, 33 U. S. C. § 928 (1970 ed., Supp. II); Federal Water Pollution Control Act, § 505 (d), as added, 86 Stat. 888, 33 U. S. C. § 1365 (d) (1970 ed., Supp. II); Marine Protection, Research, and Sanctuaries Act of 1972, § 105 (g)(4), 33 U. S. C. § 1415 (g)(4) (1970 ed., Supp. II);

tory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. Under the antitrust laws, for instance, allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory.[34] In patent litigation, in contrast, "[t]he court in *exceptional* cases *may* award reasonable attorney fees to the prevailing party." 35 U. S. C. § 285 (emphasis added). Under Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3 (b),[35] the pre-

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35 U. S. C. § 285 (patent infringement); Servicemen's Readjustment Act, 38 U. S. C. § 1822 (b); Clean Air Act, § 304 (d), as added, 84 Stat. 1706, 42 U. S. C. § 1857h–2 (d); Civil Rights Act of 1964, Tit. II, § 204 (b), 78 Stat. 244, 42 U. S. C. § 2000a–3 (b), and Tit. VII, § 706 (k), 78 Stat. 261, 42 U. S. C. § 2000e–5 (k); Fair Housing Act of 1968, § 812 (c), 82 Stat. 88, 42 U. S. C. § 3612 (c); Noise Control Act of 1972, § 12 (d), 86 Stat. 1244, 42 U. S. C. § 4911 (d) (1970 ed., Supp. II); Railway Labor Act, § 3, 44 Stat. 578, as amended, 48 Stat. 1192, as amended, 45 U. S. C. § 153 (p); The Merchant Marine Act of 1936, § 810, 49 Stat. 2015, 46 U. S. C. § 1227; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Interstate Commerce Act, §§ 8, 16 (2), 24 Stat. 382, 384, 49 U. S. C. §§ 8, 16 (2), and § 308 (b), as added, 54 Stat. 940, as amended, 49 U. S. C. § 908 (b); Fed. Rules Civ. Proc. 37 (a) and (c). See generally 1 Speiser §§ 12:61–12:71; Annotation, *supra*, n. 31, at 922–942.

[34] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and *shall recover* threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15 (emphasis added).

Other statutes which are mandatory in terms of awarding attorneys' fees include the Fair Labor Standards Act, 29 U. S. C. § 216 (b); the Truth in Lending Act, 15 U. S. C. § 1640 (a); and the Merchant Marine Act of 1936, 46 U. S. C. § 1227.

[35] "In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

Other statutory examples of discretion in awarding attorneys' fees

vailing party is entitled to attorneys' fees, at the discretion of the court, but we have held that Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968). See also *Northcross* v. *Board of Education of the Memphis City Schools*, 412 U. S. 427 (1973). Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.[36]

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are the Securities Act of 1933, 15 U. S. C. § 77k (e); the Trust Indenture Act, 15 U. S. C. § 77www (a); the Securities Exchange Act of 1934, 15 U. S. C. §§ 78i (e), 78r (a); the Civil Rights Act of 1964, Tit. VII, 42 U. S. C. § 2000e–5 (k); the Clean Air Act, 42 U. S. C. § 1857h–2 (d); the Noise Control Act of 1972, 42 U. S. C. § 4911 (d) (1970 ed., Supp. II).

[36] Quite apart from the specific authorizations of fee shifting in particular statutes, Congress has recently confronted the question of the general availability of legal services to persons economically unable to retain a private attorney. See the Legal Services Corporation Act of 1974, Pub. L. 93–355, 88 Stat. 378, 42 U. S. C. § 2996 *et seq.* (1970 ed., Supp. IV). Section 1006 (f), 42 U. S. C. § 2996e (f) (1970 ed., Supp. IV), addresses one type of fee shifting: "If an action is commenced by the Corporation or by a recipient and a final order is entered in favor of the defendant and against the Corporation or a recipient's plaintiff, the court may, upon motion by the defendant and upon a finding by the court that the action was commenced or pursued for the sole purpose of harassment of the defendant or that the Corporation or a recipient's plaintiff maliciously abused legal process, enter an order (which shall be appealable before being made final) awarding reasonable costs and legal fees incurred by the defendant in defense of the action, except when in contravention of a State law, a rule of court, or a statute of general applicability. Any such costs and fees shall be directly paid by the Corporation."

On the other hand, remarks made during the debates on this legislation indicate that there was no intent to restrict the plaintiff's

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee shifting in connection with treble-damages awards under the antitrust laws is a prime example; cf. *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 265–266 (1972); and we have noted that Title II of the Civil Rights Act of 1964 was intended "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman, supra,* at 402 (footnote omitted). But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others. But it would be difficult, indeed, for the courts, without legislative

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recovery of attorneys' fees in actions commenced by the Corporation or its recipient where under the circumstances other plaintiffs would be awarded such fees. 120 Cong. Rec. 15001 (1974) (Rep. Meeds); *id.*, at 15008 (Rep. Steiger); *id.*, at 24037 (Sen. Cranston); *id.*, at 24052 (Sen. Mondale); *id.*, at 24056 (Sen. Kennedy). Thus, if other plantiffs might recover on the private-attorney-general theory, so might the Corporation. Congress itself, of course, has provided for counsel fees under various statutes on a private-attorney-general basis; and we find nothing in these remarks indicating any congressional approval of judicially created private-attorney-general fee awards.

guidance, to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former. If the statutory limitation of right-of-way widths involved in this case is a matter of the gravest importance, it would appear that a wide range of statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U. S. C. § 1983 seeking to vindicate *constitutional* rights? Moreover, should courts, if they were to embark on the course urged by respondents, opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff? [37] Should awards be discretionary or mandatory? [38] Would there be a presumption operating for or against them in the ordinary case? See *Newman, supra.*[39]

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[37] Congress in its specific statutory authorizations of fee shifting has in some instances provided that either party could be given such an award depending upon the outcome of the litigation and the court's discretion, see, *e. g.*, 35 U. S. C. § 285 (patent infringement); Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3 (b), 2000e–5 (k), while in others it has specified that only one of the litigants can be awarded fees. See, *e. g.*, the antitrust laws, 15 U. S. C. § 15; Fair Labor Standards Act, 29 U. S. C. § 216 (b).

[38] Congress has specifically provided in the statutes allowing awards of fees whether such awards are mandatory under particular conditions or whether the court's discretion governs. See nn. 34 and 35, *supra*.

[39] MR. JUSTICE MARSHALL, *post*, at 284–285, after concluding that the federal courts have equitable power which can be used to create and implement a private-attorney-general rule, attempts to solve the problems of manageability which such a rule would necessarily raise. To do so, however, he emasculates the theory. Instead of a straightforward award of attorneys' fees to the winning plaintiff

As exemplified by this case itself, it is also evident that the rational application of the private-attorney-general rule would immediately collide with the express provision

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who undertakes to enforce statutes embodying important public policies, as the Court of Appeals proposed, MR. JUSTICE MARSHALL would tax attorneys' fees in favor of the private attorney general only when the award could be said to impose the burden on those who benefit from the enforcement of the law. The theory that he would adopt is not the private-attorney-general rule, but rather an expanded version of the common-fund approach to the awarding of attorneys' fees. When Congress has provided for allowance of attorneys' fees for the private attorney general, it has imposed no such common-fund conditions upon the award. The dissenting opinion not only errs in finding authority in the courts to award attorneys' fees, without legislative guidance, to those plaintiffs the courts are willing to recognize as private attorneys general, but also disserves that basis for fee shifting by imposing a limiting condition characteristic of other justifications.

That condition ill suits litigation in which the purported benefits accrue to the general public. In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. The Court of Appeals, very familiar with the litigation and the parties after dealing with the merits of the suit, concluded that "imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries . . . ." 161 U. S. App. D. C., at 449, 495 F. 2d, at 1029. MR. JUSTICE MARSHALL would apparently hold that factual assessment clearly wrong. See *post*, at 288.

If one accepts, as MR. JUSTICE MARSHALL appears to do, the limitations of 28 U. S. C. § 2412, which in the absence of authority under other statutes forbids an award of attorneys' fees against the United States or any agency or official of the United States, see nn. 40 and 42, *infra*, it becomes extremely difficult to predict when his version of the private-attorney-general basis for allowing fees

of 28 U. S. C. § 2412.[40] Except as otherwise provided by statute, that section permits costs to be taxed against the United States, "but not including the fees and expenses

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would produce an award against a private party in litigation involving the enforcement of a federal statute such as that involved in this case—all in contrast to the typical result under those federal statutes which themselves provide for private actions and for an award of attorneys' fees to the successful private plaintiff as, for example, under the antitrust laws. There remains the private plaintiff whose suit to enforce federal or state law is pressed against defendants who include the State or one or more of its agencies or officers as, for instance, the typical suit under 42 U. S. C. § 1983. Even here Eleventh Amendment hurdles must be overcome, see n. 44, *infra*, and if they are not, there may be few remaining defendants who would satisfy the dissenting opinion's description of the litigant who may be saddled with his opponent's attorneys' fees.

We add that in the three-part test suggested by MR. JUSTICE MARSHALL, *post*, at 284–285, for administering a judicially created private-attorney-general rule, the only criterion which purports to enable a court to determine which statutes should be enforced by application of the rule is the first: "the important right being protected is one actually or necessarily shared by the general public or some class thereof . . . ." Absent some judicially manageable standard for gauging "importance," that criterion would apply to all substantive congressional legislation providing for rights and duties generally applicable, that is, to virtually all congressional output. That result would solve the problem of courts selectively applying the rule in accordance with their own particular substantive-law preferences and priorities, but its breadth requires more justification than MR. JUSTICE MARSHALL provides by citing this Court's common-fund and common-benefit cases.

MR. JUSTICE MARSHALL's application of his suggested rule to this case, however, demonstrates the problems raised by courts generally assaying the public benefits which particular litigation has produced. The conclusion of the dissenting opinion is that "[t]here is hardly room for doubt" that respondents' litigation has protected an "important right . . . actually or necessarily shared by the general public or some class thereof . . . ." *Post*, at 285. Whether that conclusion is correct or not, it would appear at the very least

[*Footnote 40 is on p. 267*]

of attorneys," in any civil action brought by or against the United States or any agency or official of the United States acting in an official capacity. If, as respondents argue, one of the main functions of a private attorney general is to call public officials to account and to insist that they enforce the law, it would follow in such cases that attorneys' fees should be awarded against the Government or the officials themselves. Indeed, that very claim was asserted in this case.[41] But § 2412 on its face, and in light of its legislative history, generally bars such awards,[42] which, if allowable at all, must be expressly

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that, as in any instance of conflicting public-policy views, there is room for doubt on each side. The opinions below are evidence of that fact. See 161 U. S. App. D. C., at 452–456, 495 F. 2d, at 1032–1036 (majority opinion); *id.*, at 459–461, 495 F. 2d, at 1039–1041 (MacKinnon, J., dissenting); *id.*, at 462–464, 495 F. 2d, at 1042–1044 (Wilkey, J., dissenting). It is that unavoidable doubt which calls for specific authority from Congress before courts apply a private-attorney-general rule in awarding attorneys' fees.

[40] "Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

[41] See *supra*, at 246.

[42] The Act of Mar. 3, 1887, which provided for the bringing of suits against the United States, covered the awarding of costs against the Government in the following section:

"If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred

provided for by statute, as, for example, under Title II of the Civil Rights Act of 1964, 42 U. S. C. § 2000a–3 (b).[43]

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for witnesses, and for summoning the same, and fees paid to the clerk of the court." § 15, 24 Stat. 508.

The same section was included in the Judicial Code of 1911. § 152, 36 Stat. 1138. In 1946, the Federal Tort Claims Act provided: "Costs shall be allowed in all courts to the succesful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." § 410 (a), 60 Stat. 844. The 1948 Code provided in 28 U. S. C. § 2412 (a) (1946 ed., Supp. II) that "[t]he United States shall be liable for fees and costs only when such liability is expressly provided for by Act of Congress." The Reviser observed: "[Section 2412 (a)] is new. It follows the well-known common-law rule that a sovereign is not liable for costs unless specific provision for such liability is made by law." Noting that many statutes exempt the United States from liability for fees and costs, the Reviser concluded that "[a] uniform rule, embodied in this section, will make such specific exceptions unnecessary." In 1966, § 2412 was amended to its present form. 80 Stat. 308. The Senate Report on the proposed bill stated that "[t]he costs referred to in the section do not include fees and expenses of attorneys." S. Rep. No. 1329, 89th Cong., 2d Sess., 3 (1966). See also H. R. Rep. No. 1535, 89th Cong., 2d Sess., 2, 3 (1966). The Attorney General, in transmitting the proposal for legislation which led to the amendment, said that "[t]he bill makes it clear that the fees and expenses of attorneys . . . may not be taxed against the United States." *Id.*, at 4. See *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 163 U. S. App. D. C. 90, 499 F. 2d 1095 (1974), cert. denied, 420 U. S. 962 (1975).

Without departing from this pattern, the Federal Tort Claims Act of 1946 in addition limited the fees which courts could allow and which attorneys could charge their clients and provided that the fees were "to be paid out of but not in addition to the amount of judgment, award, or settlement recovered, to the attorneys representing the claimant." § 422, 60 Stat. 846. See also § 410 (a). Section 422 was maintained in the 1948 Code as 28 U. S. C. § 2678 (1946 ed., Supp. II), and the percentage limitations were raised in 1966. 80 Stat. 307.

[43] See n. 35, *supra*. See also Amendments to Freedom of Infor-

We need labor the matter no further. It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U. S. C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government.[44]

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mation Act, Pub. L. 93–502, § 1 (b)(2), 88 Stat. 1561 (amending 5 U. S. C. § 552 (a)).

[44] Although an award against the United States is foreclosed by 28 U. S. C. § 2412 in the absence of other statutory authorization, an award against a state government would raise a question with respect to its permissibility under the Eleventh Amendment, a question on which the lower courts are divided. Compare *Souza* v. *Travisono*, 512 F. 2d 1137 (CA1 1975); *Class* v. *Norton*, 505 F. 2d 123 (CA2 1974); *Jordan* v. *Fusari*, 496 F. 2d 646 (CA2 1974); *Gates* v. *Collier*, 489 F. 2d 298 (CA5 1973), petition for rehearing en banc granted, 500 F. 2d 1382 (CA5 1974); *Brandenburger* v. *Thompson*, 494 F. 2d 885 (CA9 1974); *Sims* v. *Amos*, 340 F. Supp. 691 (MD Ala.), summarily aff'd, 409 U. S. 942 (1972), with *Jordan* v. *Gilligan*, 500 F. 2d 701 (CA6 1974); *Taylor* v. *Perini*, 503 F. 2d 899 (CA6 1974); *Named Individual Members* v. *Texas Highway Dept.*, 496 F. 2d 1017 (CA5 1974); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (CA3 1974). In this case, the Court of Appeals did not rely upon the Eleventh Amendment in declining to award

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years,[45] and courts have been urged to find exceptions to it.[46]

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fees against Alaska, see n. 16, *supra*, and therefore we have no occasion to address this question.

[45] See, *e. g.*, McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Ford. L. Rev. 761 (1972); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, Court Awarded Attorney's Fees and Equal Access to the Court, 122 U. Pa. L. Rev. 636, 648–655 (1974); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967). See also 1 Speiser § 12.8; Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Studies 399, 437–438 (1973).

[46] In recent years, some lower federal courts, erroneously, we think, have employed the private-attorney-general approach to award attorneys' fees. See, *e. g.*, *Souza* v. *Travisono*, *supra*; *Hoitt* v. *Vitek*, 495 F. 2d 219 (CA1 1974); *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Cornist* v. *Richland Parish School Board*, 495 F. 2d 189 (CA5 1974); *Fairley* v. *Patterson*, 493 F. 2d 598 (CA5 1974); *Cooper* v. *Allen*, 467 F. 2d 836 (CA5 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971); *Taylor* v. *Perini*, *supra*; *Morales* v. *Haines*, 486 F. 2d 880 (CA7 1973); *Donahue* v. *Staunton*, 471 F. 2d 475 (CA7 1972), cert. denied, 410 U. S. 955 (1973); *Fowler* v. *Schwarzwalder*, 498 F. 2d 143 (CA8 1974); *Brandenburger* v. *Thompson*, *supra*; *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972). The Court of Appeals for the Fourth Circuit has refused to adopt the private-attorney-general rule. *Bradley* v. *School Board of the City of Richmond*, 472 F. 2d 318, 327–331 (1972), vacated on other grounds, 416 U. S. 696 (1974). Cf. *Bridgeport Guardians, Inc.* v. *Members of Bridgeport Civil Service Comm'n*, 497 F. 2d 1113 (CA2 1974).

This Court's summary affirmance of the decision in *Sims* v. *Amos*, *supra*, cannot be taken as an acceptance of a judicially created

It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals.[47]

The decision below must therefore be reversed.

So ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, dissenting.

I agree with MR. JUSTICE MARSHALL that federal equity courts have the power to award attorneys' fees

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private-attorney-general rule. The District Court in *Sims* indicated that there was an alternative ground available—the bad faith of the defendants—upon which to base the award of fees. 340 F. Supp., at 694. See also *Edelman* v. *Jordan*, 415 U. S. 651, 670–671 (1974).

[47] The Senate Subcommittee on Representation of Citizen Interests has recently conducted hearings on the general question of court awards of attorneys' fees to prevailing parties in litigation and attempted "to ascertain whether 'fee-shifting' affords representation to otherwise unrepresented interests, whether some restriction or encouragement of the development is needed, and what place, if any, there is for legislation in this area." Hearings on Legal Fees before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pt. III, p. 788 (1973) (Sen. Tunney). As MR. JUSTICE MARSHALL said for the Court in *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116 (1974), with respect to fee shifting under the Miller Act, 49 Stat. 793, as amended, 40 U. S. C. § 270a *et seq.*, "Congress is aware of the issue." 417 U. S., at 131 (footnote omitted). As in that case, "arguments for a further departure from the American Rule . . . are properly addressed to Congress." *Ibid.*

on a private-attorney-general rationale. Moreover, for the reasons stated by Judge Wright in the Court of Appeals, I would hold that this case was a proper one for the exercise of that power. As Judge Wright concluded:

> "Acting as private attorneys general, not only have [respondents] ensured the proper functioning of our system of government, but they have advanced and protected in a very concrete manner substantial public interests. An award of fees would not have unjustly discouraged [petitioner] Alyeska from defending its case in court. And denying fees might well have deterred [respondents] from undertaking the heavy burden of this litigation." 161 U. S. App. D. C. 446, 456, 495 F. 2d 1026, 1036.

MR. JUSTICE MARSHALL, dissenting.

In reversing the award of attorneys' fees to the respondent environmentalist groups, the Court today disavows the well-established power of federal equity courts to award attorneys' fees when the interests of justice so require. While under the traditional American Rule the courts ordinarily refrain from allowing attorneys' fees, we have recognized several judicial exceptions to that rule for classes of cases in which equity seemed to favor fee shifting. See *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 391–392 (1970); *Hall* v. *Cole*, 412 U. S. 1, 5, 9 (1973). By imposing an absolute bar on the use of the "private attorney general" rationale as a basis for awarding attorneys' fees, the Court today takes an extremely narrow view of the independent power of the courts in this area—a view that flies squarely in the face of our prior cases.

The Court relies primarily on the docketing-fees-and-

court-costs statute, 28 U. S. C. § 1923, in concluding that the American Rule is grounded in statute and that the courts may not award counsel fees unless they determine that Congress so intended. The various exceptions to the rule against fee shifting that this Court has created in the past are explained as constructions of the fee statute. *Ante*, at 257. In addition, the Court notes that Congress has provided for attorneys' fees in a number of statutes, but made no such provision in others. It concludes from this selective treatment that where award of attorneys' fees is not expressly authorized, the courts should deny them as a matter of course. Finally, the Court suggests that the policy questions bearing on whether to grant attorneys' fees in a particular case are not ones that the Judiciary is well equipped to handle, and that fee shifting under the private-attorney-general rationale would quickly degenerate into an arbitrary and lawless process. Because the Court concludes that granting attorneys' fees to private attorneys general is beyond the equitable power of the federal courts, it does not reach the question whether an award would be proper against Alyeska in this case under the private-attorney-general rationale.

On my view of the case, both questions must be answered. I see no basis in precedent or policy for holding that the courts cannot award attorneys' fees where the interests of justice require recovery, simply because the claim does not fit comfortably within one of the previously sanctioned judicial exceptions to the American Rule. The Court has not in the past regarded the award of attorneys' fees as a matter reserved for the Legislature, and it has certainly not read the docketing-fees statute as a general bar to judicial fee shifting. The Court's concern with the difficulty of applying meaningful standards in awarding attorneys' fees to suc-

cessful "public benefit" litigants is a legitimate one, but in my view it overstates the novelty of the "private attorney general" theory. The guidelines developed in closely analogous statutory and nonstatutory attorneys' fee cases could readily be applied in cases such as the one at bar. I therefore disagree with the Court's flat rejection of the private-attorney-general rationale for fee shifting. Moreover, in my view the equities in this case support an award of attorneys' fees against Alyeska. Accordingly, I must respectfully dissent.

I

A

Contrary to the suggestion in the Court's opinion, our cases unequivocally establish that granting or withholding attorneys' fees is not strictly a matter of statutory construction, but has an independent basis in the equitable powers of the courts. In *Sprague* v. *Ticonic National Bank, supra,* the lower courts had denied a request for attorneys' fees from the proceeds of certain bond sales, which, because of petitioners' success in the litigation, would accrue to the benefit of a number of other similarly situated persons. This Court reversed, holding that the allowance of attorneys' fees and costs beyond those included in the ordinary taxable costs recognized by statute was within the traditional equity jurisdiction of the federal courts. The Court regarded the equitable foundation of the power to allow fees to be beyond serious question:

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts." 307 U. S., at 164. "Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional [statutory] taxable costs is part of

the original authority of the chancellor to do equity in a particular situation." *Id.*, at 166.[1]

In more recent cases, we have reiterated the same theme: while as a general rule attorneys' fees are not to be awarded to the successful litigant, the courts as well as the Legislature may create exceptions to that rule. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S., at 391–392; *Hall* v. *Cole*, 412 U. S., at 5. Under the judge-made exceptions, attorneys' fees have been assessed, without statutory authorization, for willful violation of a court order, *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 426–428 (1923); for bad faith or oppressive litigation practices, *Vaughan* v. *Atkinson*, 369 U. S. 527, 530–531 (1962); and where the successful litigants have created a common fund for recovery or extended a substantial benefit to a class, *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885); *Mills* v. *Electric Auto-Lite Co., supra.*[2] While the Court today acknowledges the continued vitality of these exceptions, it turns its back on the theory underlying them, and on the generous construction given to the common-benefit exception in our recent cases.

In *Mills*, we found the absence of statutory authorization no barrier to extending the common-benefit theory to include nonmonetary benefits as a basis for awarding

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[1] See also *Kansas City Southern R. Co.* v. *Guardian Trust Co.*, 281 U. S. 1, 9 (1930); *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575, 580 (1946).

[2] On several recent occasions we have recognized that these exceptions are well established in our equity jurisprudence. See *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 129–130 (1974); *Hall* v. *Cole*, 412 U. S. 1, 5 (1973); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718–719 (1967). See also *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968); 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1974).

fees in a stockholders' derivative suit. Discovering nothing in the applicable provisions of the Securities Exchange Act of 1934 to indicate that Congress intended "to circumscribe the courts' power to grant appropriate remedies," 396 U. S., at 391, we concluded that the District Court was free to determine whether special circumstances would justify an award of attorneys' fees and litigation costs in excess of the statutory allotment. Because the petitioners' lawsuit presumably accrued to the benefit of the corporation and the other shareholders, and because permitting the others to benefit from the petitioners' efforts without contributing to the costs of the litigation would result in a form of unjust enrichment, the Court held that the petitioners should be given an attorneys' fee award assessed against the respondent corporation.

We acknowledged in *Mills* that the common-fund exception to the American Rule had undergone considerable expansion since its earliest applications in cases in which the court simply ordered contribution to the litigation costs from a common fund produced for the benefit of a number of nonparty beneficiaries. The doctrine could apply, the Court wrote, where there was no fund at all, *id.*, at 392, but simply a benefit of some sort conferred on the class from which contribution is sought. *Id.*, at 393–394. As long as the court has jurisdiction over an entity through which the contribution can be effected, it is the fairer course to relieve the plaintiff of exclusive responsibility for the burden. Finally, we noted that even where it is impossible to assign monetary value to the benefit conferred, "the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its

shareholders." *Id.*, at 396. The benefit that we discerned in *Mills* went beyond simple monetary relief: it included the benefit to the shareholders of having available to them "an important means of enforcement of the proxy statute." *Ibid.*

Only two years ago, in a member's suit against his union under the "free speech" provisions of the Labor-Management Reporting and Disclosure Act, we held that it was within the equitable power of the federal courts to grant attorneys' fees against the union, since the plaintiff had conferred a substantial benefit on all the members of the union by vindicating their free speech interests. *Hall* v. *Cole*, 412 U S. 1 (1973). Because a court-ordered award of attorneys' fees in a suit under the free speech provision of the LMRDA promoted Congress' intention to afford meaningful protection for the rights of employees and the public generally, and because without provision of attorneys' fees an aggrieved union member would be unlikely to be able to finance the necessary litigation, *id.*, at 13, the Court held that the allowance of counsel fees was "consistent with both the [LMRDA] and the historic equitable power of federal courts to grant such relief in the interests of justice." *Id.*, at 14.

In my view, these cases simply cannot be squared with the majority's suggestion that the availability of attorneys' fees is entirely a matter of statutory authority. The cases plainly establish an independent basis for equity courts to grant attorneys' fees under several rather generous rubrics. The Court acknowledges as much when it says that we have independent authority to award fees in cases of bad faith or as a means of taxing costs to special beneficiaries. But I am at a loss to understand how it can also say that this independent judicial power succumbs to Procrustean statutory restrictions—indeed, to statutory silence—as soon as the far

from bright line between common benefit and public benefit is crossed. I can only conclude that the Court is willing to tolerate the "equitable" exceptions to its analysis, not because they can be squared with it, but because they are by now too well established to be casually dispensed with.

B

The tension between today's opinion and the less rigid treatment of attorneys' fees in the past is reflected particularly in the Court's analysis of the docketing-fees statute, 28 U. S. C. § 1923, as a general statutory embodiment of the American Rule. While the Court has held in the past that Congress can restrict the availability of attorneys' fees under a particular statute either expressly or by implication,[3] see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967), it has refused to construe § 1923 as a plenary restraint on attorneys' fee awards.

Starting with the early common-fund cases, the Court has consistently read the fee-bill statute of 1853 narrowly when that Act has been interposed as a restriction on the Court's equitable powers to award attorneys' fees. In *Trustees* v. *Greenough*, 105 U. S. 527 (1881), the Court held that the statute imposed no bar to an award of attorneys' fees from the fund collected as a result of the plaintiff's efforts, since:

"[The fee bill statute addressed] only those fees

[3] In *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116 (1974), we held that attorneys' fees should not be granted as a matter of course under the provision of the Miller Act that granted claimants the right to "sums justly due." 49 Stat. 794, as amended, 40 U. S. C. § 270b (a). To overturn the American Rule as a matter of statutory construction would be improper, we held, with no better evidence of congressional intent to provide for attorneys' fees, and in the context of everyday commercial litigation such as that under the Miller Act. 417 U. S., at 130.

> and costs which are strictly chargeable as between party and party, and [did not] regulate the fees of counsel and other expenses and charges as between solicitor and client . . . . And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require . . . ." *Id.*, at 535–536.

In *Sprague, supra,* the Court again applied this distinction in recognizing "the power of federal courts in equity suits to allow counsel fees and other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute." 307 U. S., at 164. The Court there identified the costs "between party and party" as the sole target of the 1853 Act and its successors. The award of attorneys' fees beyond the limited ordinary taxable costs, the Court termed costs "as between solicitor and client"; it held that these expenses, which could be assessed to the extent that fairness to the other party would permit, were not subject to the restrictions of the fee statute. *Id.*, at 166, and n. 2. Whether this award was collected out of a fund in the court or through an assessment against the losing party in the litigation was not deemed controlling. *Id.*, at 166–167; *Mills,* 396 U. S., at 392–394.

More recently, the Court gave its formal sanction to the line of lower court cases holding that the fee statute imposed no restriction on the equity court's power to include attorneys' fees in the plaintiff's award when the defendant has unjustifiably put the plaintiff to the expense of litigation in order to obtain a benefit to which the latter was plainly entitled. *Vaughan* v. *Atkinson,* 369 U. S. 527 (1962). Distinguishing *The Baltimore,* 8 Wall. 377 (1869), a case upon which the Court

today heavily relies, the Court in *Vaughan* noted that the question was not one of "costs" in the statutory sense, since the attorneys' fee award was legitimately included as a part of the primary relief to which the plaintiff was entitled, rather than an ancillary adjustment of litigation expenses.[4]

Finally, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967), the Court undertook a comprehensive review of the assessment of attorneys' fees in federal-court actions. While noting that nonstatutory exceptions to the American Rule had been sanctioned "when overriding considerations of justice seemed to compel such a result," *id.*, at 718, the Court held that the meticulous provision of remedies available under the Lanham Act and the history of unsuccessful attempts to include an attorneys' fee provision in the Act precluded the Court's implying a right to attorneys' fees in trademark actions. The Court did not, however, purport to find a statutory basis for the American Rule, and in fact it treated § 1923 as a "general exception" to the American Rule, not its statutory embodiment. 386 U. S., at 718 n. 11.

My Brother WHITE concedes that the language of the 1853 statute indicating that the awards provided therein were exclusive of any other compensation is no longer a part of the fee statute. But we are told that the fee statute should be read as if that language were still in the Act,

[4] Although *Vaughan* was an admiralty case and therefore subject to the possibly narrow reading as a case evincing a special concern for plaintiff seamen as wards of the admiralty court, we have not given the case such a narrow construction. See *Hall* v. *Cole*, 412 U. S., at 5; *F. D. Rich Co., Inc.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S., at 129 n. 17. Indeed, the *Vaughan* Court itself relied on *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951), a nonadmiralty case in which the plaintiff was awarded attorneys' fees as an equitable matter because of the obduracy of the defendant in opposing the plaintiff's civil rights claim.

since there is no indication in the legislative history of the 1948 revision of the Judicial Code that the revisers intended to alter the meaning of § 1923. Yet even if that language were still in the Act, I should think that the construction of the Act in the cases creating judicial exceptions to the American Rule would suffice to dispose of the Court's argument. Since that language is no longer a part of the fee statute, it seems even less reasonable to read the fee statute as an uncompromising bar to equitable fee awards.

Nor can any support fairly be drawn from Congress' failure to provide expressly for attorneys' fees in either the National Environmental Policy Act or the Mineral Leasing Act, while it has provided for fee awards under other statutes. Confronted with the more forceful argument that other sections of the *same* statute included express provisions for recovery of attorneys' fees, we twice held that specific-remedy provisions in some sections should not be interpreted as evidencing congressional intent to deny the courts the power to award counsel fees in actions brought under other sections of that Act that do not mention attorneys' fees. *Hall* v. *Cole,* 412 U. S., at 11; *Mills* v. *Electric Auto-Lite Co.,* 396 U. S., at 390–391. Indeed, the *Mills* Court interpreted congressional silence, not as a prohibition, but as authorization for the Court to decide the attorneys'-fees issue in the exercise of its coordinate, equitable power. *Id.,* at 391. In rejecting the argument from congressional silence in *Mills* and *Hall,* the Court relied on the established rule that implied restrictions on the power to do equity are disfavored. *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329 (1944).[5] The same principle

[5] The words of the *Hecht* Court apply well to the case at hand: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities

applies, *a fortiori,* to this case, where the implication must be drawn from the presence of attorneys' fees provisions in other, unrelated pieces of legislation.[6]

In sum, the Court's primary contention—that Congress enjoys hegemony over fee shifting because of the docketing-fee statute and the occasional express provisions for attorneys' fees—will not withstand even the most casual reading of the precedents. The Court's recognition of the several judge-made exceptions to the American rule demonstrates the inadequacy of its analysis. Whatever the Court's view of the wisdom of fee shifting in "public benefit" cases in general, I think that it is a serious misstep for it to abdicate equitable authority in this area in the name of statutory construction.

II

The statutory analysis aside, the Court points to the difficulties in formulating a "private attorney general" exception that will not swallow the American Rule. I do not find the problem as vexing as the majority does. In fact, the guidelines to the proper application of the

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of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied." 321 U. S., at 329–330.

[6] The Court makes the further point that 28 U. S. C. § 2412 generally precludes a grant of attorneys' fees against the Federal Government and its officers. Even if this is true, I fail to see how it supports the view that the private-attorney-general rationale should be jettisoned altogether. There are many situations in which other entities, both private and public, are sued in public interest cases. If attorneys' fees can properly be imposed on those parties, I see no reason why the statutory immunity of the Federal Government should have any bearing on the matter.

private-attorney-general rationale have been suggested in several of our recent cases, both under statutory attorneys' fee provisions and under the common-benefit exception.

In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), we held that successful plaintiffs who sue under the discretionary-fee-award provision of Title II of the Civil Rights Act of 1964 are entitled to the recovery of fees "unless special circumstances would render such an award unjust." 390 U. S., at 402. The Court reasoned that if Congress had intended to authorize fees only on the basis of bad faith, no new legislation would have been required in view of the long history of the bad-faith exception. *Id.*, at 402 n. 4. The Court's decision in *Newman* stands on the necessity of fee shifting to permit meaningful private enforcement of protected rights with a significant public impact. The Court noted that Title II did not provide for a monetary award, but only equitable relief. Absent a fee-shifting provision, litigants would be required to suffer financial loss in order to vindicate a policy "that Congress considered of the highest priority." 390 U. S., at 402. Accordingly, the Court read the attorneys'-fee provision in Title II generously, since if "successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." 390 U. S., at 402.

Analyzing the attorneys'-fee provision in § 718 of the Education Amendments Act of 1972, the Court in *Bradley* v. *School Board of the City of Richmond*, 416 U. S. 696, 718 (1974), made a similar point. There the school board, a publicly funded governmental entity, had been engaged in litigation with parents of schoolchildren in the district. The Court observed that the

two parties had vastly disparate resources for litigation, and that the plaintiffs had "rendered substantial service both to the Board itself, by bringing it into compliance with its constitutional mandate, and to the community at large by securing for it the benefits assumed to flow from a nondiscriminatory educational system." *Id.*, at 718. Although the analysis in *Newman* was directed at construing the statutory-fees provision and the analysis in *Bradley* went to the question of whether the fees provision should be applied to services rendered before its enactment, the arguments in those cases for reading the attorneys' fee provisions broadly is quite applicable to nonstatutory cases as well.

Indeed, we have already recognized several of the same factors in the recent common-benefit cases. In *Mills*, we emphasized the benefit to the class of shareholders of having a meaningful remedy for corporate misconduct through private enforcement of the proxy regulations. Since the beneficiaries could fairly be taxed for this benefit, we held that the fee award should be made available. Similarly, in *Hall*, we pointed to the imbalance between the litigating power of the union and one of its members: in order to ensure that the right in question could be enforced, we held that attorneys' fees should be provided in appropriate cases. Additionally, we noted that the enforcement of the rights in question would accrue to the special benefit of the other union members, which justified assessing the attorneys' fees against the treasury of the defendant union.

From these cases and others, it is possible to discern with some confidence the factors that should guide an equity court in determining whether an award of attorneys' fees is appropriate.[7] The reasonable cost of the

[7] These teachings have not been lost on the lower courts in which the elements of the private-attorney-general rationale have been

plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.

There is hardly room for doubt that the first of these criteria is met in the present case. Significant public benefits are derived from citizen litigation to vindicate expressions of congressional or constitutional policy. See *Newman* v. *Piggie Park Enterprises, supra.* As a result of this litigation, respondents forced Congress to revise the Mineral Leasing Act of 1920 rather than permit its continued evasion. See Pub. L. 93–153, 87 Stat. 576. The 1973 amendments impose more stringent safety and liability standards, and they require Alyeska to pay fair market value for the right-of-way and to bear the costs of applying for the permit and monitoring the right-of-way.

Although the NEPA issues were not actually decided, the lawsuit served as a catalyst to ensure a thorough analysis of the pipeline's environmental impact. Requir-

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more fully explored. See *e. g., Souza* v. *Travisono,* 512 F. 2d 1137 (CA1 1975); *Hoitt* v. *Vitek,* 495 F. 2d 219 (CA1 1974); *Knight* v. *Auciello,* 453 F. 2d 852 (CA1 1972); *Cornist* v. *Richland Parish School Board,* 495 F. 2d 189 (CA5 1974); *Fairley* v. *Patterson,* 493 F. 2d 598 (CA5 1974); *Cooper* v. *Allen,* 467 F. 2d 836 (CA5 1972); *Lee* v. *Southern Home Sites Corp.,* 444 F. 2d 143 (CA5 1971); *Taylor* v. *Perini,* 503 F. 2d 899 (CA6 1974); *Morales* v. *Haines,* 486 F. 2d 880 (CA7 1973); *Donahue* v. *Staunton,* 471 F. 2d 475 (CA7 1972), cert. denied, 410 U. S. 955 (1973); *Fowler* v. *Schwarzwalder,* 498 F. 2d 143 (CA8 1974); *Brandenburger* v. *Thompson,* 494 F. 2d 885 (CA9 1974); *La Raza Unida* v. *Volpe,* 57 F. R. D. 94 (ND Cal. 1972); *Wyatt* v. *Stickney,* 344 F. Supp. 387 (MD Ala. 1972); *NAACP* v. *Allen,* 340 F. Supp. 703 (MD Ala. 1972).

ing the Interior Department to comply with the NEPA and draft an impact statement satisfied the public's statutory right to have information about the environmental consequences of the project, 83 Stat. 853, 42 U. S. C. § 4332 (C), and also forced delay in the construction until safeguards could be included as conditions to the new right-of-way grants.[8]

Petitioner contends that these "beneficial results . . . might have occurred" without this litigation. Brief for Petitioner 11, 36–42. But the record demonstrates that Alyeska was unwilling to observe and the Government unwilling to enforce congressional land-use policy. Private action was necessary to assure compliance with the Mineral Leasing Act; the new environmental, technological, and land-use safeguards written into the 1973 amendments to the Act are directly traceable to the respondents' success in this litigation. In like manner, continued action was needed to prod the Interior Department into filing an impact statement; prior to the litigation, the Department and Alyeska were prepared to proceed with the construction of the pipeline on a piecemeal basis without considering the overall risks to the environment and to the physical integrity of the pipeline.

The second criterion is equally well satisfied in this case. Respondents' willingness to undertake this litigation was largely altruistic. While they did, of course, stand to benefit from the additional protections they sought for the area potentially affected by the pipeline, see *Sierra Club* v. *Morton,* 405 U. S. 727 (1972), the direct benefit to these citizen organizations is truly dwarfed by the demands of litigation of this proportion. Extensive factual discovery, expert scientific analysis, and legal

[8] See S. Rep. No. 93–207, p. 18 (1973); H. R. Rep. No. 93–414, p. 14 (1973); Hearings on S. 970, S. 993, and S. 1565 before the Senate Committee on Interior and Insular Affairs, 93d Cong., 1st Sess., pt. 4, pp. 56, 127 (1973).

research on a broad range of environmental, technological, and land-use issues were required. See Affidavit of Counsel (Re Bill of Costs), App. 213–219. The disparity between respondents' direct stake in the outcome and the resources required to pursue the case is exceeded only by the disparity between their resources and those of their opponents—the Federal Government and a consortium of giant oil companies.

Respondents' claim also fulfills the third criterion, for Alyeska is the proper party to bear and spread the cost of this litigation undertaken in the interest of the general public. The Department of the Interior, of course, bears legal responsibility for adopting a position later determined to be unlawful. And, since the class of beneficiaries from the outcome of this litigation is probably coextensive with the class of United States citizens, the Government should in fairness bear the costs of respondents' representation. But, the Court of Appeals concluded that it could not impose attorneys' fees on the United States, because in its view the statute providing for assessment of costs against the Government, 28 U. S. C. § 2412, permits the award of ordinary court costs, "but [does] not includ[e] the fees and expenses of attorneys." Since the respondents did not cross-petition on that point, we have no occasion to rule on the correctness of the court's construction of that statute.[9]

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[9] The statute, construed in light of the rule against implied restrictions on equity jurisdiction, may not foreclose attorneys' fee awards against the United States in all cases. Section 2412 states that the ordinary recoverable costs shall not include attorneys' fees; it may be read not to bar fee awards, over and above ordinary taxable costs, when equity demands. In any event, there are plainly circumstances under which § 2412 would not bar attorneys' fee awards against the United States, see, *e. g.*, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 484 F. 2d 1331 (CA1 1973).

Before the Department and the courts, Alyeska advocated adoption of the position taken by Interior, playing a major role in all aspects of the case.[10] This litigation conferred direct and concrete economic benefits on Alyeska and its principals in affording protection of the physical integrity of the pipeline. If a court could be reasonably confident that the ultimate incidence of costs imposed upon an applicant for a public permit would indeed be on the general public, it would be equitable to shift those costs to the applicant.[11] In this connection, Alyeska, as a consortium of oil companies that do business in 49 States and account for some 20% of the national oil market, would indeed be able to redistribute the additional cost to the general public. In my view the ability to pass the cost forward to the consuming public warrants an award here. The decision to bypass Congress and avoid analysis of the environmental consequences of the pipeline was made in the first instance by Alyeska's principals and not the Secretary of the Interior. The award does not punish the consortium for these actions but recognizes that it is an effective substitute for the public beneficiaries who successfully challenged these actions. Since the Court of Appeals held Alyeska accountable for a fair share of the fees to ease the burden on the public-minded citizen litigators, I would affirm the judgment below.

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[10] In requiring Alyeska to pay only half of the fee, the Court of Appeals correctly recognized that, absent the statutory bar, the Government would have been in an equal position to shift the costs to the public beneficiaries.

[11] See Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 902–905 (1975).

HILL, ATTORNEY GENERAL OF TEXAS *v.* STONE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 73-1723. Argued January 14, 1975—Decided May 12, 1975

After a bond authorization election to finance construction of a city library was defeated in Fort Worth, Tex., appellee Fort Worth residents brought an action in the Federal District Court challenging the provisions of the State Constitution, Election Code, and city charter limiting the right to vote in city bond issue elections to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district in the year of the election. A three-judge District Court held that this restriction on suffrage did not serve any compelling state interest and therefore violated the Equal Protection Clause of the Fourteenth Amendment. *Held:*

1. The Texas rendering requirement erects a classification that impermissibly disfranchises persons otherwise qualified to vote, solely because they have not rendered some property for taxation. Pp. 294–301.

(a) As long as the election is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest. *Kramer* v. *Union School District*, 395 U. S. 621, 626–627; *Cipriano* v. *City of Houma*, 395 U. S. 701, 704. Pp. 295–297.

(b) Fort Worth's election was not a "special interest" election, since a general obligation bond issue, even where the debt services will be paid entirely out of property taxes, is a matter of general interest. *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204. And the rendering requirement's alleged furtherance of the state interests in protecting property owners who will bear the direct burden of retiring the city's bond indebtedness and in encouraging prospective voters to render their property and thereby help enforce the State's tax laws, falls far short of meeting the "compelling state interest" test applied in *Kramer*, *Cipriano*, and *Phoenix*, *supra*. Pp. 298–301.

2. The District Court's ruling should apply only to those bond authorization elections that were not final on the date of that court's judgment, and as to other jurisdictions that may have similar restrictive voting classifications, this Court's decision should apply only to elections not final as of the date of this decision. Pp. 301–302.

377 F. Supp. 1016, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 302. DOUGLAS, J., took no part in the consideration or decision of the case.

David M. Kendall, First Assistant Attorney General of Texas, argued the cause for appellant. On the brief were *John L. Hill,* Attorney General, *pro se, Larry F. York,* former First Assistant Attorney General, and *Mike Willatt* and *G. Charles Kobdish,* Assistant Attorneys General.

Don Gladden argued the cause for appellees. With him on the brief for appellees Stone et al. was *Marvin Collins. S. G. Johndroe, Jr.,* filed a brief for appellees city of Fort Worth et al.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case requires us once again to consider the constitutionality of a classification restricting the right to vote in a local election.

Appellees, residents of Fort Worth, Tex., brought this action to challenge the state and city laws limiting the

**Edward W. Dunbar* filed a brief for El Paso County Junior College District as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed by *James F. McKibben, Jr.,* for the city of Corpus Christi; by *Marshall Boykin III* for William O. Harrison, Jr., et al.; and by *Joe Purcell, Manly W. Mumford, Fred H. Rosenfeld,* and *Harold B. Judell* for the city of Phoenix et al.

franchise in city bond elections to persons who have made available for taxation some real, mixed, or personal property. A three-judge District Court held that this restriction on suffrage did not serve any compelling state interest and therefore violated the Equal Protection Clause of the Fourteenth Amendment. *Stone* v. *Stovall,* 377 F. Supp. 1016 (ND Tex. 1974). We granted a partial stay of the District Court's order pending disposition of the appeal. 416 U. S. 963 (1974). We subsequently noted probable jurisdiction. 419 U. S. 822 (1974).

I

The Texas Constitution provides that in all municipal elections "to determine expenditure of money or assumption of debt," only those who pay taxes on property in the city are eligible to vote. Tex. Const. Art. 6, § 3. In addition, it directs that in any election held "for the purpose of issuing bonds or otherwise lending credit, or expending money or assuming any debt," the franchise shall be limited to those qualified voters "who own taxable property in the . . . district . . . where such election is held," and who have "duly rendered the same for taxation." § 3a. The implementing statutes impose the same requirements, adding that to qualify for voting a resident of the district holding the election must have "rendered" [1] his property for taxation to the district

[1] To "render" property for taxation means to list it with the tax assessor-collector of the taxing district in question. Property is "rendered" for taxation either when the owner reports it or when the tax assessor-collector places it on the tax rolls himself. Taxable property includes all real, mixed, and personal property with limited exemptions, such as $3,000 for homesteads and $250 for household furnishings. Tex. Const. Art. 8, § 1. Although state law requires taxpayers to render all their taxable property, Tex. Rev. Civ. Stat. Arts. 7145, 7152 (1960 and Supp. 1974–1975), there is no penal sanction for failing to do so voluntarily.

during the proper period of the election year, and that he must sign an affidavit indicating that he has done so. Tex. Elec. Code §§ 5.03, 5.04, 5.07 (1967 and Supp. 1974–1975). The Fort Worth City Charter further provides that the city shall not issue bonds unless they are authorized in an election of the "qualified voters who pay taxes on property situated within the corporate limits of the City of Ft. Worth." Charter of the City of Fort Worth, c. 25, § 19.

In 1969, after our decisions in *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621 (1969), and *Cipriano* v. *City of Houma,* 395 U. S. 701 (1969), the Texas Attorney General devised a "dual box election procedure" to be used in all the State's local bond elections. Under this procedure, all persons owning taxable property rendered for taxation voted in one box, and all other registered voters cast their ballots in a separate box. The results in both boxes were tabulated, and the bond issue would be deemed to have passed only if it was approved by a majority vote both in the "renderers' box" and in the aggregate of both boxes. This scheme ensured that the bonds would be safe from challenge even if the state-law restrictions on the franchise were later held unconstitutional.

On April 11, 1972, the city of Fort Worth conducted a tax bond election, using the dual-box system to authorize the sale of bonds to improve the city transportation system and to build a city library. Since the state eligibility restrictions had previously been construed to require only that the prospective voter render some property for taxation, even if he did not actually pay any tax on the property, *Montgomery Independent School District* v. *Martin,* 464 S. W. 2d 638 (Tex. 1971), all those who signed an affidavit indicating that they had rendered some property were permitted to vote in the "renderers'

box." Of the 29,000 voters who participated in the bond election, approximately 24,000 voted as renderers and 5,000 as nonrenderers. The transportation bond proposal was approved in both boxes and in the aggregate. The library bonds, however, were less well received. Although the library bonds were approved by a majority of all the voters, they were defeated in the renderers' box, and were therefore deemed not to have been authorized.

The appellees, three of whom had voted as nonrenderers,[2] then filed this action in the United States District Court for the Northern District of Texas, claiming that the partial disfranchisement of persons not rendering property for taxation denied them equal protection of the laws.[3] A three-judge District Court was convened; it heard argument, and on March 25, 1974, it entered judgment for the appellees. The court declared the relevant provisions of the Texas Constitution, the Texas Election Code, and the Fort Worth City Charter unconstitutional "insofar as they condition the right to vote in bond elections on citizens' rendering property for taxation." 377 F. Supp., at 1024. Although the court ruled that its decree would not make invalid any bonds already author-

[2] Of the five named appellees, three voted as nonrenderers and two as rendering property owners. They sought to represent the class of all persons who voted in the election in favor of the library bonds. The District Court certified the class as proper under Fed. Rule Civ. Proc. 23 (b)(2). The city of Fort Worth and various city officials, who were defendants below, are listed as appellees in this Court, but they support the appeal and have filed a brief urging reversal, and are not included in subsequent references to appellees.

[3] The effect of the dual-box procedure was that the nonrenderers could help defeat a bond issue, but they could not help pass it. If their votes, added to the votes of the renderers, produced a majority against the bonds, the bonds would not be issued, even if the renderers favored them. But if the renderers opposed the bonds, the nonrenderers' votes would be of no effect, even if they produced an overall majority in favor of the bond issue.

ized or any bond elections held before the date of the judgment, it ordered the city defendants to count the ballots of those who had voted in the nonrenderers' box, and it enjoined any future restriction of the franchise in state bond elections to those who have rendered property for taxation.

While all three judges concurred in the judgment, each member of the panel wrote separately. Judge Thornberry concluded that the Texas scheme was invalid because it divided the otherwise eligible voters into two classifications—renderers and nonrenderers—and that the disfranchisement of those who did not render property for taxation violated the Equal Protection Clause. Judge Woodward concurred in the result on the ground that the rendering requirement was tantamount to a requirement of property ownership, which he concluded was impermissible under this Court's decision in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Judge Brewster concurred in the judgment, but only because he thought the case was controlled by our decision in *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970), where we held invalid a statute restricting the franchise in a general obligation bond election to real property owners.

II

Appellant, the Attorney General of Texas,[4] argues that none of this Court's cases draws into question a voting restriction of the sort used in this election. The eligibility scheme does not impose a wealth restriction on the exercise of the franchise, the appellant contends, and any

[4] The Attorney General was joined as a defendant because Texas law requires that he certify the validity of any municipal bond issue. Tex. Rev. Civ. Stat. Arts. 709d (1964 and Supp. 1974–1975), 4398 (1966).

classification that it does create is reasonable and should be upheld on that basis.

A

In *Kramer* v. *Union Free School District No. 15,* 395 U. S. 621 (1969), we held that in an election of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest in order to survive constitutional attack. The appellant in *Kramer* challenged a New York statute that limited eligibility to vote in local school board elections to persons who owned or leased taxable real property in the school district, or who had children enrolled in the public schools. We expressed no opinion in *Kramer* whether a State might in some circumstances limit the franchise to those "primarily interested" in the election,[5] but we held that the New York statute had impermissibly excluded many persons with a distinct and direct interest in the decisions of the school board, while at the same time including others with no substantial interest in school affairs. The fact that the school district was supported by a property tax did not mean that only those subject to direct assessment felt the effects of the tax burden, and the inclusion of parents would not exhaust the class of persons interested in the conduct of local school affairs.

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[5] We answered that question in *Salyer Land Co.* v. *Tulare Water District,* 410 U. S. 719 (1973). In that case, we held that a water district created for the purpose of acquiring, storing, and distributing water for agricultural purposes could constitutionally have a board of directors selected in an election in which votes were allocated according to the assessed value of each voter's land. Because of its "special limited purpose and . . . the disproportionate effect of its activities on landowners as a group," *id.,* at 728, the Court held that the water district election was of sufficient "special interest" to a single group that the franchise could constitutionally be denied to others.

In *Cipriano* v. *City of Houma*, 395 U. S. 701 (1969), decided the same day, we invalidated a Louisiana statute limiting the franchise in local revenue bond elections to the "property taxpayers" of the district.[6] As in *Kramer*, the city had failed to prove that under its classification all those excluded from voting were in fact substantially less interested or affected than those permitted to vote. *Id.*, at 704. The bonds in *Cipriano* were intended to finance extension and improvement of the city's utility system. We pointed out that the operation of a utility system affects property owners and nonproperty owners alike, and since those not included among the eligible voters often use the utility services, they might well feel the effect of outstanding revenue bonds through the utility rates they would be required to pay.

The next Term, in *City of Phoenix* v. *Kolodziejski*, *supra*, we ruled unconstitutional a similar restriction of the franchise to real property taxpayers in a general obligation bond issue. The interests of property owners and nonproperty owners in a general obligation bond issue, we held, were not sufficiently disparate to justify excluding those owning no real property. The residents of the city, whether property owners or not, had a common interest in the facilities that the bond issue would make available, and they would all be substantially affected by the outcome of the election, both in terms of the benefits provided and the obligations incurred. Under the Phoenix bond arrangement, we noted that some of the debt service would be paid out of reve-

[6] In Louisiana, as in Texas, personal property as well as real property was subject to taxation, and a "property taxpayer" could include a person with only personalty. The administrative practice was to tax only real property, however, so the effect was that in reality "property taxpayer" meant "real property taxpayer." See *Stewart* v. *Parish School Board*, 310 F. Supp. 1172, 1173 n. 3 (ED La.), aff'd, 400 U. S. 884 (1970).

nues other than property tax receipts, so nonproperty owners would be directly affected to some extent. We added, however, that even where the municipality looks only to property tax revenues for servicing general obligation bonds, the franchise could not legitimately be restricted to real property owners:

> "Property taxes may be paid initially by property owners, but a significant part of the ultimate burden of each year's tax on rental property will very likely be borne by the tenant rather than the landlord since . . . the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent." 399 U. S., at 210.

In addition, we noted that property taxes on commercial property would normally be treated as a cost of doing business and would "be reflected in the prices of goods and services purchased by nonproperty owners and property owners alike." *Id.*, at 211.

The basic principle expressed in these cases is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest. See *Kramer*, 395 U. S., at 626–627; *Cipriano*, 395 U. S., at 704.

The appellant's claim that the Fort Worth election was one of special interest and thus outside the principles of the *Kramer* case runs afoul of our decision in *City of Phoenix* v. *Kolodziejski*, *supra*. In the *Phoenix* case, we expressly stated that a general obligation bond issue—even where the debt service will be paid entirely out of property taxes as in Fort Worth—is a matter of general interest, and that the principles of *Kramer* apply to

classifications limiting eligibility among registered voters.

In making the alternative contentions that the "rendering requirement" creates no real "classification," or that the classification created should be upheld as being reasonable, the appellant misconceives the rationale of *Kramer* and its successors. Appellant argues that since all property is required to be rendered for taxation, and since anyone can vote in a bond election if he renders any property, no matter how little, the Texas scheme does not discriminate on the basis of wealth or property.[7] Our cases, however, have not held or intimated that only property-based classifications are suspect; in an election of general interest, restrictions on the franchise of any character must meet a stringent test of justification. The Texas scheme creates a classification based on rendering, and it in effect disfranchises those who have not rendered their property for taxation in the year of the bond election. Mere reasonableness will therefore not suffice to sustain the classification created in this case.

B

The appellant has sought to justify the State's rendering requirement solely on the ground that it extends

[7] As a practical matter, under Texas' scheme of tax assessment and collection, the rendering requirement may in effect create a property-related classification. Appellees' counsel informed us at oral argument that Fort Worth, like other communities in Texas, makes no affirmative effort to tax property other than realty and business personalty. Tr. of Oral Arg. 26–27. Residents are free to "render" other forms of personalty, but this is apparently seldom done. See Yudof, The Property Tax in Texas Under State and Federal Law, 51 Tex. L. Rev. 885, 889–890 (1973). As a result, in Fort Worth those with realty and business personalty are automatically eligible to vote as "renderers," while other voters must take the somewhat unusual step of voluntarily "rendering" their property for taxation. When he does so, the taxpayer affirms that he has rendered all his property, and that the valuation of the property is correct. Tex. Rev. Civ. Stat. Arts. 7164, 7184 (1960).

some protection to property owners, who will bear the direct burden of retiring the city's bonded indebtedness. The *Phoenix* case, however, rejected this analysis of the "direct" imposition of costs on property owners. Even under a system in which the responsibility of retiring the bonded indebtedness falls directly on property taxpayers, all members of the community share in the cost in various ways. Moreover, the construction of a library is not likely to be of special interest to a particular, well-defined portion of the electorate. Quite apart from the general interest of the library bond election, the appellant's contention that the rendering requirement imposes no real impediment to participation itself undercuts the claim that it serves the purpose of protecting those who will bear the burden of the debt obligations. If anyone can become eligible to vote by rendering property of even negligible value, the rendering requirement can hardly be said to select voters according to the magnitude of their prospective liability for the city's indebtedness.[8]

The appellee city officials argue that the rendering qualification furthers another state interest: it encourages prospective voters to render their property and thereby helps enforce the State's tax laws. This argument is difficult to credit. The use of the franchise to compel compliance with other, independent state objectives is questionable in any context. See *United States* v. *Texas*, 252 F. Supp. 234, 253–254 (WD Tex.), aff'd, 384 U. S. 155 (1966). It seems particularly dubious

[8] This argument is similar to the one made by the State of Georgia in defense of its "freeholder" requirement for membership on county boards of education. *Turner* v. *Fouche*, 396 U. S. 346, 363–364 (1970). The State there claimed that the freeholder requirement imposed no real burden, since a candidate would qualify if he owned even a single square inch of land. We concluded that if that was the case it was difficult to conceive that the requirement served any rational state interest whatsoever.

here, since under the State's construction of the rendering requirement, an individual will be given the right to vote if he renders any property at all, no matter how trivial. Those rendering solely to earn the right to vote in bond elections may well render property of minimal value, in order to qualify for voting without imposing upon themselves a substantial tax liability. The rendering requirement thus seems unlikely to have any significant impact on the asserted state policy of encouraging each person to render all of his property.[9]

In sum, the Texas rendering requirement erects a classification that impermissibly disfranchises persons otherwise qualified to vote, solely because they have not rendered some property for taxation. The *Phoenix* case

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[9] Appellant relies on this Court's decisions in *McDonald* v. *Board of Election*, 394 U. S. 802 (1969), and *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), in defense of the classification created by Texas law in this case. In *McDonald*, however, the only issue before the Court was whether pretrial detainees in Illinois jails were unconstitutionally denied absentee ballots. The Court expressly noted that there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants' exercise of their right to vote. See 394 U. S., at 807–809. Any classification actually restraining the fundamental right to vote, the Court noted, would be subject to close scrutiny. In *Rosario*, the Court upheld a neutral requirement that a voter register a party preference 30 days in advance of the general election in order to be eligible to participate in the succeeding primary election. Because the registration requirement served the "legitimate and valid state goal" of "preservation of the integrity of the electoral process," 410 U. S., at 761, and because it imposed no special burden on any class before the Court, see *id.*, at 759 n. 9, the Court held that the time limitation on registration did not violate either the Equal Protection Clause or the First and Fourteenth Amendment right of association. By contrast, the Texas scheme imposes a restriction on the franchise having no perceptible purpose or effect in preserving the integrity of the electoral process; instead, it excludes a portion of the electorate for failing to comply with a wholly independent state policy.

establishes that Fort Worth's election was not a "special interest" election, and the state interests proffered by appellant and the city officials fall far short of meeting the "compelling state interest" test consistently applied in *Kramer*, *Cipriano*, and *Phoenix*.

III

In order to avoid the possibility of upsetting previous bond elections in the State, the District Court declined to give retroactive effect to its judgment. We have followed the same course in our prior cases dealing with voting classifications in bond elections, see *Cipriano*, 395 U. S., at 706; *Phoenix*, 399 U. S., at 213–215, and we agree with the District Court's determination not to give its ruling retroactive effect. Since the portion of the District Court's judgment invalidating the state constitutional and statutory provisions has been in full effect since that time,[10] and since some local bond elections may subsequently have been conducted in reliance on that judgment, we hold that the District Court's ruling should apply only to those bond authorization elections that were not final on the date of the District Court's judgment. As to other jurisdictions that may have restrictive voting classifications similar to those in Texas,[11] we hold that our decision should not apply where

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[10] The partial stay of the District Court's judgment was granted only to the extent that the judgment below had prohibited the use of the dual-box election procedure. 416 U. S. 963.

[11] There may be no such jurisdictions, at least where bond election voting qualifications are governed by statewide statutes and constitutional provisions. We are told that in the 15 States besides Texas that restricted the franchise to taxpayers in some fashion at the time the *Phoenix* case was decided, all qualified voters are now permitted to participate in bond elections. Brief for City of Phoenix, Ariz., et al. as *Amici Curiae* 19. In addition to the 13 States referred to in *City of Phoenix* v. *Kolodziejski*, 399 U. S.

the authorization to issue the securities is legally complete as of the date of this decision.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

The Texas Constitution restricts the vote in general obligation bond elections to those who render taxable property with local taxing officials. Tex. Const. Art. 6, § 3a. All real, personal, or mixed property owned by any citizen of the State is taxable property under state law. Tex. Const. Art. 8, § 1; Tex. Rev. Civ. Stat. Arts. 7145, 7147 (1960 and Supp. 1974–1975). And all citizens of the State are required by law to render all such taxable property with local taxing officials on a yearly basis in order that it be added to local tax rolls. Tex. Rev. Civ Stat. Arts. 7145, 7151, 7152, 7153, 7189 (1960 and Supp. 1974–1975).

The rendering requirement for voting is satisfied by the listing of any single item of property, even though of purely nominal worth, with taxing officials and the completion of an affidavit provided at polling places with a description of any single item of property which the voter has properly rendered. Tex. Elec. Code § 5.03 *et seq.* (1967 and Supp. 1974–1975); *Montgomery Independent School District* v. *Martin*, 464 S. W. 2d 638, 640 (Tex. 1971); *Dubose* v. *Ainsworth*, 139 S. W. 2d 307, 308 (Tex. Civ. App. 1940). Rendering immedi-

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204, 213 n. 11 (1970), Nevada and Wyoming utilized a dual-box election procedure much like Texas', but in both cases that procedure has been abandoned. See Nev. Laws 1971, c. 49; Wyo. Laws 1973, c. 251.

ately before the election of any item of property qualifies, even though untimely under the rendering statutes, *Markowsky* v. *Newman,* 134 Tex. 440, 449–450, 136 S. W. 2d 808, 813 (1940), and the absence of adequate facilities for the rendering of property eliminates the rendition requirement. *Hanson* v. *Jordan,* 145 Tex. 320, 198 S. W. 2d 262 (1946); *Green* v. *Stienke,* 321 S. W. 2d 95 (Tex. Civ. App. 1959). Under state law, the Texas elector who renders a pair of shoes or a bicycle on election day casts a vote no different from that of a rendering cattle baron.

Not surprisingly, the Texas Supreme Court in *Montgomery Independent School District* v. *Martin, supra,* upheld the rendering qualification:

> "[V]oter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax.
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> . . . . . .
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> " . . . One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. . . .
>
> . . . . . .
>
> ". . . To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights." 464 S. W. 2d, at 640–642.

Appellees in the instant case have not drawn our attention to a totally propertyless citizen of Fort Worth, poorer than Diogenes, whose total lack of ownership pre-

cludes him from complying with the rendering requirement. Instead, the alleged deprived class in the instant case consists of those who violated their legal obligation under state law, choosing not to render any property by reason of carelessness, a tax-avoidance motive, or otherwise. And the alleged deprivation of equal protection lies in self-disfranchisement caused by their failure to utilize readily available facilities to render property.

Since laws considered by this Court under the Equal Protection Clause are not abstract propositions subject to a requirement of disembodied equality which invalidates classifications without examination of the circumstances surrounding them, *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940), we have without exception in passing upon governmental requirements affecting voting looked to the character of the classification challenged as denying equal protection and the individual interests affected by it. *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Dunn* v. *Blumstein*, 405 U. S. 330, 335, 336 (1972). And our prior cases have held that scrutiny under this Clause is triggered only where restrictions have a real and appreciable impact on ability to exercise the franchise. See *McDonald* v. *Board of Election*, 394 U. S. 802, 807–808 (1969); *Kramer* v. *Union Free School District No. 15*, 395 U. S. 621, 626–627, n. 6 (1969); *Gordon* v. *Lance*, 403 U. S. 1, 5 (1971); *Bullock* v. *Carter*, 405 U. S. 134, 144 (1972).

In *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), we upheld a New York registration requirement requiring registration in a party 11 months in advance of its primary as a prerequisite to participation in the primary, stating:

> "We cannot accept the petitioners' contention. None of the cases on which they rely is apposite to the situation here. In each of those cases, the State

> totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote. . . . Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters . . . . Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary. . . . The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment." *Id.*, at 757–758.

Even the four dissenting Members of the Court in that case would have required a "serious burden or infringement" on the right to vote as a prerequisite to the establishment of a constitutional violation. *Id.*, at 767 (POWELL, J., joined by DOUGLAS, BRENNAN, and MARSHALL, JJ., dissenting). See also *id.*, at 765.

In the immediate case, appellees and the class of nonrenderers they represent could have easily complied with the rendering qualification, imposed not only as a prerequisite for voting but also as a legal duty necessary to the orderly operation of a voluntary self-assessment taxing system. The burden imposed by the qualification was *de minimis* and compliance was universally easy.

Despite this, the Court, without inquiry into the impact of the Texas qualification on appellees' ability to vote, concludes that the Texas scheme is unconstitutional. *Ante*, at 298, 300–301.

As might be expected when dealing with provisions

of state law in the abstract, the theoretical arguments advanced both in support of the constitutionality of the provisions involved here, and against their constitutionality, tend to cut both ways. The State contends that because anyone could have complied with the rendering qualification, the burden on the franchise is minimal. The Court disposes of this contention by concluding that in such event the rendering requirement must serve no valid state policy. The State also contends that the rendering requirement does serve the state policy of increasing the amount of personal property on the tax rolls, which property in turn will be taxed to retire the bonded indebtedness incurred as a result of the election in question. The Court's response to this contention is that if this be the case, the requirement unreasonably burdens the franchise. This constitutional dialogue is somewhat less than edifying, and may be traced in part to the dichotomy drawn by *Kramer* v. *Union Free School District No. 15, supra,* where all voting qualifications in an "election of general interest," *ante,* at 295, were herded into two categories. Those dealing with "residence, age, and citizenship," *ibid.,* received the Court's imprimatur, while the "strict scrutiny" test was to be applied to other requirements. The basis of this judicially created classification would itself scarcely survive a "rational basis" test, unexplained as it is by any of our decisions. But even taking *Kramer* on its own terms, no sound reason is advanced for applying it to the situation before us now.

The Court distinguishes, *ante,* at 300 n. 9, our decision in *Rosario* on the grounds that the New York registration requirement involved in that case, unlike the Texas rendering qualification for bond elections, was directed toward " 'preserv[ing] the integrity of the electoral process.' "

As a factual matter, the offered distinction is a doubtful one. The purpose sought to be served by the registration requirement examined in *Rosario* was the prevention of "raiding": the crossing of party lines by members of one party in order to affect the outcome of the primary election of another political party. The rendering qualification under challenge in the instant case is designed in part to prevent citizens who violate their legal obligations by totally avoiding any portion of their fair share of obligations resulting from a bond election, however small that share may be, from influencing the process which results in the imposition of such obligations. If the integrity of the electoral process is violated by allowing citizens, who are unwilling to assume the responsibilities of party membership, to vote in party primaries, it is difficult to understand how it is less violated by allowing citizens, who are unwilling to assume their fair share of the obligations occurring from a bond election, to vote in such an election.

As the Court indicates, *ante*, at 298 n. 7, appellees at oral argument asserted that the rendering requirement in practice functions as a property-related classification since realty and business personalty make up virtually all of the property actually subject to taxation in Fort Worth. However, appellees also conceded that their allegation was without support in the record in this case. Tr. of Oral Arg. 31. To the extent that the record does speak to appellees' assertion, it shows the rendition of substantial amounts of personal property in Fort Worth and in the State generally. App. 68, 81–84. While one member of the three-judge panel below indicated his suspicion that the rendering requirement operated as a *de facto* exclusion of non-real-property owners, another member of the panel indicated his disagreement. Compare 377 F. Supp. 1016, 1020 (opinion of Thorn-

berry, J.), with *id.*, at 1025 (opinion of Woodward, J., specially concurring). In light of the serious question raised by this disagreement and the absence of evidence in the record resolving it, I would vacate the judgment below and remand this case for factual determination of whether the rendering requirement as administered in Texas has the practical effect of impermissibly disfranchising identifiable groups of voters such as non-real-property owners and thereby constitutes a genuine burden on the franchise. Cf. *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970).

UNITED STATES v. WILSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–1162. Argued December 17, 1974—Decided May 19, 1975

Respondents, who had been charged, along with one Anderson, in separate indictments for separate bank robberies and who pleaded guilty, were summoned as prosecution witnesses at Anderson's trial but refused to testify on Fifth Amendment grounds and still refused to do so after being granted immunity and ordered to testify. The District Court then summarily held them in contempt under Fed. Rule Crim. Proc. 42 (a), which permits summary criminal contempt punishment "if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." The Court of Appeals reversed, holding that the use of the summary contempt power under Rule 42 (a) was improper, and remanded for proceedings under Rule 42 (b), which calls for disposition of criminal contempt only after notice and hearing and "a reasonable time for the preparation of the defense." *Held:* The District Court properly imposed summary contempt punishment under the circumstances. *Harris* v. *United States*, 382 U. S. 162, distinguished. Pp. 314–319.

(a) Respondents' refusals to answer, although not delivered disrespectfully, fall within Rule 42 (a)'s express language, and plainly constitute conduct contemptuous of judicial authority, since they were intentional obstructions of court proceedings that literally disrupted the progress of the trial and hence the orderly administration of justice. Pp. 314–316.

(b) The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing trial, as it did here, summary contempt must be available to vindicate the court's authority as well as to provide the recalcitrant witness with some incentive to testify. P. 316.

(c) *Harris* v. *United States*, *supra*, involved a refusal to answer before a grand jury where, unlike an ongoing trial, time generally is not of the essence because the grand jury may turn to other matters during any delay. Pp. 318–319.

488 F. 2d 1231, reversed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which REHNQUIST, J., joined, *post*, p. 320. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 322.

Gerald P. Norton argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Frey,* and *William L. Patton.*

Sheila Ginsberg argued the cause for respondent Wilson. With her on the brief were *William E. Hellerstein* and *Phylis Skloot Bamberger. John S. Martin, Jr.,* argued the cause and filed a brief for respondent Bryan.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a district court may impose summary contempt punishment under Fed. Rule Crim. Proc. 42 (a) [1] when a witness who has been granted immunity, refuses on Fifth Amendment grounds to testify. The Court of Appeals held that in such circumstances a judge cannot dispose of the contempt summarily, but must proceed under Rule 42 (b),[2]

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[1] Rule 42 (a) provides:

"(a) Summary Disposition.

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[2] Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing.

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting

which calls for disposition only after notice and hearing, and "a reasonable time for the preparation of the defense."

I

Respondents Wilson and Bryan, along with one Robert Anderson, were charged in separate indictments with separate bank robberies. Respondent Wilson, and Anderson, were charged with armed robbery of a bank in Tuxedo, N. Y. Respondent Bryan, and Anderson, were charged with armed robbery of a bank in Mount Ivy, N. Y. Prior to Anderson's trial both respondents pleaded guilty to charges against them, but neither was immediately given a final sentence. Sentencing of Wilson was deferred, and, pending a presentence report, Bryan was given a provisional 25-year sentence, as required by 18 U. S. C. §§ 4208 (b), (c).

At Anderson's trial for the two robberies, respondents were summoned as witnesses for the prosecution. When questioned, however, each refused to testify, contending that his answers might incriminate him. The judge then granted them immunity, 18 U. S. C. §§ 6002–6003,[3]

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the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

[3] In the Court of Appeals respondents contended that the immunity granted was not coextensive with the scope of the Fifth Amendment privilege against self-incrimination. *Kastigar* v. *United States,* 406 U. S. 441, 449 (1972). The Court of Appeals ruled that respondents had not raised the claim in a proper fashion, and

and, relying on *Goldberg* v. *United States*, 472 F. 2d 513 (CA2 1973), ordered them to answer forthwith. He informed them that as long as they did not lie under oath they could not be prosecuted by reason of any testimony, but that if they continued to refuse to answer he would hold them in contempt. Respondents nevertheless persisted in their refusals, and the judge summarily held them in contempt. Counsel for Wilson, who acted for both respondents, argued for lenient sentences; however, trial counsel made no objection to the summary nature of the contempt citation,[4] nor was any claim made that more time was needed to prepare a defense to the contempt citation.

Both respondents were then sentenced to six months' imprisonment, consecutive to any sentences imposed for the bank robberies. The judge made it clear that he would consider reducing the contempt sentences, or eliminating them completely, if respondents decided to testify. When counsel pointed out that a presentence study was being prepared on Bryan the judge responded: "I am going to impose the maximum . . . with the deliberate intention of revising that sentence to what might be appropriate in light of the very study that is going to be made." App. 33.

The trial proceeded, but without Bryan's testimony the evidence against Anderson on the Mount Ivy robbery was such that at the end of the Government's case

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respondents did not seek review of that conclusion. Thus no issue concerning the scope of immunity is before us.

[4] Earlier in the proceeding counsel had requested a continuance to study whether respondents could be compelled to testify after a grant of immunity. App. 5. The trial judge did not allow a continuance. *Id.*, at 6. The Court of Appeals, however, considered that for purposes of appeal the request was sufficient objection to the summary contempt citation. The Government does not contest that ruling so we do not address it.

the judge granted Anderson's motion for acquittal. The jury was unable to reach a verdict on the Tuxedo robbery. At a later trial Anderson was convicted of that robbery.

Respondents appealed their contempt convictions. The Court of Appeals rejected the claim that their Fifth Amendment rights would have been violated by compelling them to testify after they had been granted immunity, but it accepted their contention that use of the summary contempt power was improper, and it remanded for proceedings under Rule 42 (b). 488 F. 2d 1231 (CA2 1973). The court reasoned that "[i]f . . . counsel had been given 'a reasonable time for the preparation of the defense,' Fed. R. Crim P. Rule 42 (b), she might have marshalled and presented facts in mitigation of the charge." *Id.*, at 1234.[5]

In requiring Rule 42 (b) disposition the Court of

[5] For example, the court mentioned that respondent Wilson's experience suggested the possibility of a psychiatric defense. With time to prepare, the Court of Appeals said, counsel might have "enlarged on the issue of [Wilson's] mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness." 488 F. 2d, at 1234–1235. The record does not support such a defense. On order of the District Court, Wilson had been given a psychiatric examination to determine his competency to stand trial. 18 U. S. C. § 4244. He was found competent; however, at the Anderson trial his lawyer argued that the examination revealed family difficulties that may have been a reason for his antisocial behavior. App. 12–13. The District Court agreed that further investigation of Wilson's psychiatric problems might be helpful for *sentencing* purposes. *Id.*, at 12, 17. The record does not show that either counsel or the District Court considered for a moment that further psychiatric investigation might provide a defense to the contempt charge. The psychiatric investigation was to determine whether Wilson might more appropriately be placed on probation with psychiatric treatment rather than confined in a prison. *Id.*, at 13, 17.

Appeals considered itself bound by its own previous decisions, and by this Court's decision in *Harris* v. *United States*, 382 U. S. 162 (1965). In a previous case the Court of Appeals had held:

> "Summary disposition is thus available only when immediate punishment is necessary to put an end to acts disrupting the proceedings, such as threats to the judge, disturbances in the courtroom or insolence before the court. It is not a remedy to be used in a case like this where the contempt consists of no more than orderly refusal in the absence of the jury to answer a question on Fifth Amendment grounds . . . ." *United States* v. *Pace*, 371 F. 2d 810, 811 (CA2 1967).

In another case the Court of Appeals had interpreted the language of our *Harris* decision to require that "[a]bsent . . . disruptive conduct, which affronts the dignity of the court, a hearing pursuant to Rule 42 (b) is required to explore possible exculpatory or mitigating circumstances." *United States* v. *Marra*, 482 F. 2d 1196, 1200 (CA2 1973). In the Court of Appeals' view only a disorderly or obstreperous interference with court proceedings provides an occasion for use of the summary contempt power. *Id.*, at 1201–1202.

Because of the importance of this issue in the conduct of criminal trials, and because the view of the Court of Appeals for the Second Circuit apparently conflicts with that of the Court of Appeals for the First Circuit, *Baker* v. *Eisenstadt*, 456 F. 2d 382, cert. denied, 409 U. S. 846 (1972), we granted certiorari. 416 U. S. 981 (1974). We reverse.

II

Respondents' refusals to answer, although not delivered disrespectfully, plainly fall within the express lan-

guage of Rule 42 (a),[6] and constitute contemptuous conduct. Rule 42 (a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial. All that is necessary is that the judge certify that he "saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Respondents do not contest that these requirements are met here. Indeed, here each refusal was in the context of a face-to-face encounter between the judge and respondents. See *Illinois* v. *Allen*, 397 U. S. 337 (1970); *Cooke* v. *United States*, 267 U. S. 517 (1925).

The refusals were contemptuous of judicial authority because they were intentional obstructions[7] of court

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[6] Rule 42 applies the contempt power defined in 18 U. S. C. § 401. See *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 326–327 (1904); *Ex parte Robinson*, 19 Wall. 505, 510 (1874). That statute provides that a federal court has the power to punish by fine or imprisonment, at its discretion, such contempt of its authority as "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." The predecessor of the statute was enacted to limit the broad power granted by the Judiciary Act of 1789, 1 Stat. 73. *Nye* v. *United States*, 313 U. S. 33, 45, 50 (1941). Courts had indiscriminately used the summary contempt power to punish persons for acts that occurred far from the court's view and which, in truth, could not be considered direct affronts to its dignity, and obstructions of justice. Thus the phrase "in its presence or so near thereto" was intended to apply a geographical limitation on the power. *Id.*, at 50. Misbehavior actually in the face of the court remained punishable summarily, and this Court made it clear that contemptuous actions "actually interrupting the court in the conduct of its business," *id.*, at 52, were summarily punishable just as "misbehavior in the vicinity of the court disrupting to quiet and order." *Ibid.*

[7] The trial judge explained to respondents the protection accorded by the grant of immunity and that if they continued in their refusals he would hold them in contempt. He also offered them an oppor-

proceedings that literally disrupted the progress of the trial and hence the orderly administration of justice. *Yates* v. *United States*, 227 F. 2d 844 (CA9 1955). Respondents' contumacious silence, after a valid grant of immunity followed by an explicit, unambiguous order to testify, impeded the due course of Anderson's trial perhaps more so than violent conduct in the courtroom. Violent disruptions can be cured swiftly by bodily removing the offender from the courtroom, or by physical restraints, *Illinois* v. *Allen*, *supra;* see *Ex parte Terry*, 128 U. S. 289 (1888), and the trial may proceed. But as this case demonstrates, a contumacious refusal to answer not only frustrates the inquiry but can destroy a prosecution. Here it was a prosecution; the same kind of contumacious conduct could, in another setting, destroy a defendant's ability to establish a case.

The face-to-face refusal to comply with the court's order itself constituted an affront to the court,[8] and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify. *In re Chiles*, 22 Wall. 157, 168 (1875). Whether such incentive is necessary in a par-

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tunity to speak in their own behalf. *Groppi* v. *Leslie*, 404 U. S. 496, 501 (1972). Moreover, the judge made it clear that he would consider reducing the sentences if respondents did testify. App. 19–20, 21, 33. In view of this their continued refusals to testify can only be termed intentional.

[8] In order to constitute an affront to the dignity of the court the judge himself need not be personally insulted. Here the judge indicated he was not personally affronted by respondents' actions. He said: "I am not angry at Mr. Wilson because he refuses to testify. That is up to him." App. 14. He also said: "I don't consider [Bryan] to have a chip on his shoulder towards the Court or towards me." *Id.*, at 33.

ticular case is a matter the Rule wisely leaves to the discretion of the trial court.[9]

Our conclusion that summary contempt is available under the circumstances here is supported by the fact that Rule 42 has consistently been recognized to be no more than a restatement of the law existing when the Rule was adopted, *Bloom* v. *Illinois,* 391 U. S. 194, 209 (1968); Notes of the Advisory Committee on Rule 42 (a), 18 U. S. C. App. p. 4513; *Cooke* v. *United States,* 267 U. S. 517 (1925),[10] and the law at that time allowed summary punishment for refusals to testify, *Hale* v. *Henkel,* 201 U. S. 43 (1906); *Nelson* v. *United States,* 201 U. S. 92 (1906); *Blair* v. *United States,* 250 U. S. 273

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[9] In *Shillitani* v. *United States,* 384 U. S. 364, 371 n. 9 (1966), we said:

"[T]he trial judge [should] first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."

Here, of course, that admonition carries little weight because at the time they acted contemptuously both respondents were incarcerated due to their own guilty pleas. Under the circumstances here the threat of immediate confinement for civil contempt would have provided little incentive for them to testify. Contrast, *Anglin* v. *Johnston,* 504 F. 2d 1165 (CA7 1974), cert. denied, 420 U. S. 962 (1975). Nevertheless, the careful trial judge made it clear to respondents that if they relented and obeyed his order he would consider reducing their sentences; and he also explained that he would consider other factors in deciding whether to reduce the sentences. *Supra,* at 312.

[10] Sources contemporaneous with the adoption of this Rule uniformly indicate that subsection (a) is substantially a restatement of existing law, 6 N. Y. U. School of Law, Institute Proceedings—Federal Rules of Criminal Procedure 73 (1946); Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L. J. 197, 244 n. 268 (1947); Orfield, Federal Rules of Criminal Procedure, 26 Neb. L. Rev. 570, 613 n. 189 (1947), and was not intended to alter the circumstances in which notice and a hearing are required.

(1919). See *Ex parte Hudgings*, 249 U. S. 378, 382 (1919); *Brown* v. *Walker*, 161 U. S. 591 (1896), and cases cited therein, cf. *Ex parte Kearney*, 7 Wheat. 38 (1822); *In re Savin*, 131 U. S. 267 (1889).

III

The Court of Appeals considered itself bound by language in *Harris* v. *United States*, 382 U. S. 162 (1965), to hold Rule 42 (a) inapplicable to the facts here. The crucial difference between the cases, however, is that *Harris* did not deal with a refusal to testify which obstructed an ongoing trial. In *Harris* a witness before a grand jury had been granted immunity, 18 U. S. C. § 6002, and nevertheless refused to answer certain questions. The witness was then brought before a District Judge and asked the same questions again. When he still refused to answer, the court summarily held him in contempt. We held in that case that summary contempt was inappropriate because there was no compelling reason for an immediate remedy.

A grand jury ordinarily deals with many inquiries and cases at one time, and it can rather easily suspend action on any one, and turn to another while proceedings under Rule 42 (b) are completed. We noted in *Harris* that "swiftness was not a prerequisite of justice . . . . Delay necessary for a hearing would not imperil the grand jury proceedings." 382 U. S., at 164. Trial courts, on the contrary, cannot be expected to dart from case to case on their calendars any time a witness who has been granted immunity decides not to answer questions. In a trial, the court, the parties, witnesses, and jurors are assembled in the expectation that it will proceed as scheduled. Here the District Judge pointed out this problem when defense counsel asked for a continuance; he said: "I think we cannot delay this trial. I cannot delay it. I

have many other matters that are equally important to the people concerned in those cases which are following." [11] Delay under Rule 42 (b) may be substantial, and all essential participants in the trial may no longer be readily available when a trial reconvenes. In *Harris* this Court recognized these problems in noting that summary punishment may be necessary where a "refusal [is] . . . an open, serious threat to orderly procedure." 382 U. S., at 165. A refusal to testify during a trial may be such an open, serious threat, and here it plainly constituted a literal "breakdown" in the prosecution's case.

IV

In an ongoing trial, with the judge, jurors, counsel, and witnesses all waiting, Rule 42 (a) provides an appropriate remedial tool to discourage witnesses from contumacious refusals to comply with lawful orders essential to prevent a breakdown of the proceedings. Where time is not of the essence, however, the provisions of Rule 42 (b) may be more appropriate to deal with contemptuous conduct. We adhere to the principle that only "'[t]he least possible power adequate to the end proposed'" should be used in contempt cases. *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821). See *Taylor* v. *Hayes*, 418 U. S. 488, 498 (1974). As with all power, the authority under Rule 42 (a) to punish summarily can be abused; the courts of appeals, however, can deal with abuses of discretion without restricting the Rule in contradiction of its express terms, and without unduly limiting the power of the trial judge to act swiftly and firmly to prevent contumacious conduct from disrupting the orderly progress of a criminal trial.

Reversed.

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[11] App. 6.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring.

In *Brown* v. *United States*, 359 U. S. 41 (1959), the petitioner had refused, on Fifth Amendment grounds, to answer questions put to him by a federal grand jury. He thereafter was immunized by the District Judge but, on returning to the grand jury room, persisted in his refusal to answer questions. He again was taken before the District Judge, who repeated the grand jury's questions and ordered the petitioner to answer. He again refused. The court then, pursuant to Fed. Rule Crim. Proc. 42 (a), adjudged him guilty of criminal contempt. This Court, by a 5–4 vote, sustained the judgment, and expressly approved the use of summary proceedings; it did so on the ground that the refusal to answer before the District Judge was a contempt "committed in the actual presence of the court," within the meaning of Rule 42 (a). 359 U. S., at 47–52.

Less than seven years later, in *Harris* v. *United States*, 382 U. S. 162 (1965), the Court, with two new Justices, was confronted with a factual situation identical in all relevant respects to that in *Brown*. In *Harris*, however, the Court, again by a 5–4 vote, concluded that the witness' refusal to answer the questions before the District Judge was not a contempt "committed in the actual presence of the court." It reasoned:

> "The real contempt, if such there was, was contempt before the grand jury—the refusal to answer to it when directed by the court. Swearing the witness and repeating the questions before the judge was an effort to have the refusal to testify 'committed in the actual presence of the court' for the purposes of Rule 42 (a). It served no other purpose, for the witness had been adamant and had made his position known. The appearance before the District Court was not a new and different pro-

> ceeding, unrelated to the other. It was ancillary to the grand jury hearing and designed as an aid to it." 382 U. S., at 164–165.

The Court then expressly overruled *Brown*. *Id.*, at 167.

I was not on the Court when *Brown* and *Harris* were decided. Had I been, I would have joined the Court in *Brown* and the dissenters in *Harris*. Although I join the Court's opinion today, I write separately to express my conviction that *Harris*, at the most, now stands for nothing more than the proposition that a witness' refusal to answer grand jury questions is not conduct "in the actual presence of the court," even when the questions are restated by the district judge and the witness persists in his refusal to answer.[1]

Summary contempt, especially summary criminal contempt, as the Court indicates, *ante*, at 319, is not a power lightly to be exercised.[2] Nevertheless, summary criminal contempt is a necessary and legitimate part of a court's arsenal of weapons to prevent obstruction, violent or otherwise, of its proceedings. It is not seriously disputed that a refusal to testify is punishable as a criminal contempt. So long as this Court holds, as it has, that the

[1] The Solicitor General has invited the Court in this case to overrule *Harris*. Brief for United States 24. Since the refusal to testify, involved here, occurred during the course of a trial rather than before a grand jury, I agree with the Court's tacit conclusion to save the question of overruling *Harris* for another day.

[2] Although the use of civil contempt, as opposed to the more drastic criminal contempt, is usually to be preferred as a remedy, I am aware of no requirement that the less drastic sanction must be employed in all cases. Indeed, despite the fact that respondents were already incarcerated for substantive criminal offenses, it appears to be clear that service of their sentences could have been interrupted to compel them to serve an intervening sentence for contempt. See, *e. g.*, *United States* v. *Liddy*, 166 U. S. App. D. C. 289, 510 F. 2d 669 (1974), cert. denied, 420 U. S. 980 (1975); *Anglin* v. *Johnston*, 504 F. 2d 1165 (CA7 1974), cert. denied, 420 U. S. 962 (1975).

summary procedure of Rule 42 (a) satisfies the requirements of due process, the Rule should be read to mean precisely what it says.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question for decision in this case is one of procedure: is the criminal contempt of nonviolently and respectfully refusing to testify at a criminal trial punishable summarily by the trial judge pursuant to Fed. Rule Crim. Proc. 42 (a), or must the trial judge prosecute the contempt on notice pursuant to Rule 42(b), allowing a reasonable time for the preparation of the defense?[1] A trial judge in the District

[1] Rule 42 (a) provides:

"(a) Summary Disposition.

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing.

"A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

Court for the Southern District of New York summarily punished respondents under subdivision (a) of Rule 42 for refusing to testify at a trial. The Court of Appeals for the Second Circuit reversed and remanded on the ground that *Harris* v. *United States,* 382 U. S. 162 (1965), and the Court of Appeals' own prior decision in *United States* v. *Marra,* 482 F. 2d 1196 (1973), which had relied upon *Harris,* compelled the conclusion that the proper course was to prosecute on notice under subdivision (b) of the Rule. 488 F. 2d 1231 (1973). I would affirm the judgment of the Court of Appeals.

One Anderson was on trial in the District Court on March 29, 1973, under an indictment for armed robbery of two banks, one in Tuxedo, N. Y., and the other in Mount Ivy, N. Y. Before the trial respondent Wilson pleaded guilty to participation in the Tuxedo bank robbery and respondent Bryan pleaded guilty to participation in the Mount Ivy bank robbery. Neither respondent had been finally sentenced on his plea, however,[2] and each refused to testify against Anderson on self-incrimination grounds, and persisted in that refusal even though the trial judge granted him immunity under 18 U. S. C. §§ 6002–6003.[3] The trial judge thereupon

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[2] The trial judge who presided at Anderson's trial had deferred sentencing respondent Wilson. Another trial judge, who had been assigned respondent Bryan's indictment, had imposed a provisional 25-year sentence pending an evaluation under 18 U. S. C. § 4208 (b). After Anderson's trial, Wilson was committed as a young adult offender for an indeterminate term pursuant to 18 U. S. C. § 5010 (b), while Bryan's sentence was reduced to 10 years.

[3] When the privilege was invoked, Wilson's counsel was present and, in the absence of Bryan's counsel, attempted with the court's approval to represent both witnesses.

Sections 6002–6003 provide:

"§ 6002. Immunity generally.

"Whenever a witness refuses, on the basis of his privilege against

summarily adjudged each in criminal contempt and sentenced each to six months' imprisonment to be served consecutively to his sentence on the robbery conviction.[4]

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self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

"§ 6003. Court and grand jury proceedings.

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

[4] The contempt sentences were provisional and stayed pending appeal. The Court of Appeals rejected the Government's contention

The Court today declines the Government's invitation to overrule *Harris* v. *United States, supra,* and in that circumstance *Harris* clearly compels affirmance of the judgment of the Court of Appeals. *Harris* interpreted subdivision (a) of Rule 42 as having a narrowly limited scope and expressly excluded its application to a non-violent, respectful refusal to answer questions on the ground of self-incrimination.[5] The Court emphasized

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that the witnesses had not adequately objected to the use of summary contempt procedures:

"[U]nder the circumstances, the request by counsel for Wilson for more time to research the fifth amendment issue constituted sufficient objection. And we refuse to penalize appellant Bryan for his failure to make timely objection to the Rule 42 (a) proceeding, since his own counsel was not present. Although counsel for Wilson did her best to protect Bryan, the court having sanctioned her efforts in this regard, only a defendant's own lawyer could be fully aware of the considerations which might be raised in his behalf to mitigate a charge of contempt or the sentence thereunder, and of the likely usefulness of a hearing for development of these considerations." 488 F. 2d 1231, 1234 (CA2 1973).

At the close of the Government's case, the trial judge granted Anderson's motion for a judgment of acquittal on the Mount Ivy robbery. The jury was unable to reach a verdict on the Tuxedo robbery. At a second trial, Anderson was convicted of the Tuxedo robbery.

[5] Respondents' self-incrimination claim was based upon a concern that their testimony might prejudice their sentencing. The merits of the claim are not before us. The Court of Appeals rejected respondents' contention that the immunity given was not coextensive with the privilege against self-incrimination on the ground that neither respondent had properly raised the issue of "forbidden use": "If appellant Wilson doubted the ability of Judge Lasker to put out of his mind Wilson's statements at Anderson's trial, he should nevertheless have testified as ordered, but requested a different judge for sentencing on the robbery charge. Cf. Goldberg v. United States, 472 F. 2d 513, 516 (2d Cir. 1973). Similarly, if Bryan genuinely feared an increased sentence on his guilty plea as a result of testifying in the *Anderson* case, he, too, should have given evidence, then asked

that subdivision (a) reached a narrow category of situations and "was reserved 'for exceptional circumstances' . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings." 382 U. S., at 164. Such acts, the Court held, are not present in the case of a nonviolent, respectful refusal to answer questions on the ground of self-incrimination because in such a case "the dignity of the court was not being affronted: no disturbance had to be quelled; no insolent tactics had to be stopped." *Id.*, at 165.[6]

The Court stated its rationale for the narrow interpretation of subdivision (a) as follows:

> "We reach that conclusion in light of 'the concern long demonstrated by both Congress and this Court over the possible abuse of the contempt power' . . . and in light of the wording of the Rule. Summary contempt is for 'misbehavior' . . . in the 'actual presence of the court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.'" *Id.*, at 164.

The Court continued:

> "Summary procedure, to use the words of Chief Justice Taft, was designed to fill 'the need for immediate penal vindication of the dignity of the

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that proper precautions be taken (e. g., sealing the record) to insure that Judge Cooper would not be privy to the statements made under grant of immunity. Both were, however, required to obey the mandate of 18 U. S. C. § 6002 that 'the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination . . . .'" 488 F. 2d, at 1233.

[6] *Harris* overruled the broader reach given subdivision (a) in *Brown* v. *United States*, 359 U. S. 41 (1959). This was believed necessary to achieve the objective of its framers that the subdivision be "'substantially a restatement of existing law.'" 382 U. S., at 165 n. 3.

> court . . . .' We start from the premise long ago stated in *Anderson* v. *Dunn*, 6 Wheat. 204, 231, that the limits of the power to punish for contempt are '[t]he least possible power adequate to the end proposed.' In the instant case, the dignity of the court was not being affronted: no disturbance had to be quelled; no insolent tactics had to be stopped. The contempt here committed was far outside the narrow category envisioned by Rule 42 (a)." *Id.*, at 165.

Only last Term, the Court again emphasized that summary punishment for contempt " 'always and rightly, is regarded with disfavor' " in light of the "heightened potential for abuse posed by the contempt power," *Taylor* v. *Hayes*, 418 U. S. 488, 498, 500 (1974), and is to be resorted to only when necessary for " 'immediate penal vindication of the dignity of the court.' " *Id.*, at 498 n. 6.

I see no escape from the application of *Harris* to this case based on the difference that respondents were witnesses at an ongoing trial while the witness in *Harris* was a grand jury witness, brought before the judge and asked the same questions he had not answered before the grand jury. The Court argues that while the delay necessitated by Rule 42 (b) procedures would be unlikely seriously to disrupt grand jury proceedings it would have substantial disruptive effects in a trial. I doubt that compliance with Rule 42 (b) procedures necessarily would have substantial disruptive effects in a trial [7] but in any

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[7] In *United States* v. *Marra*, 482 F. 2d 1196 (CA2 1973), the Court of Appeals rejected that argument, stating:

"In an uncomplicated case of the present type, where the facts are simple and a brief consultation between the witness and his retained or assigned counsel should be sufficient to enable him to prepare for a Rule 42 (b) hearing, there appears to be no sound reason why the hearing could not be held within a day or two of the witness' refusal to obey the court's order. Since the hearing would in all likelihood require no more than an hour or two of the court's time,

event those effects are not the kind of obstruction of court proceedings, *Harris, supra,* at 164, that justify summary punishment under subdivision (a). For *Harris* limits application of that subdivision to conduct in the presence of the judge "where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court." *Johnson* v. *Mississippi,* 403 U. S. 212, 214 (1971).[8] In the case of respondents' nonviolent, respectful refusal to answer questions on the ground of self-incrimination, "the dignity of the court was not being affronted," [9] *Harris, supra,* at 165, and the absence of that

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trial of the criminal case could be suspended with a minimum disruption to the judicial process. Such a procedure, furthermore, lessens the risk that the witness' contumacy is the result of fright, confusion, or misunderstanding. Indeed, with the advice of counsel, or faced with imposition of a criminal sentence, he may decide to cooperate." *Id.,* at 1202.

See also *United States* v. *Pace,* 371 F. 2d 810 (CA2 1967).

The Court of Appeals said of the situation in the instant case:

"If . . . counsel had been given 'a reasonable time for the preparation of the defense,' Fed. R. Crim. P. 42 (b), she might have marshalled and presented facts in mitigation of the charge. Significantly, the record reveals the possibility of a psychiatric defense, at least for Wilson [cf. *Panico* v. *United States,* 375 U. S. 29 (1963)]. . . .

"Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing." 488 F. 2d, at 1234–1235.

The trial judge has broad discretion to specify the time for preparation of a defense to a charge of criminal contempt. See *Nilva* v. *United States,* 352 U. S. 385, 395 (1957).

[8] "[Rule 42 (b)] is controlling in any case of contempt occurring outside the actual presence of the court, but it applies too to most cases of contempt in the court's presence." 3 C. Wright, Federal Practice and Procedure 171–172 (1969).

[9] It is undisputed that respondents asserted their Fifth Amendment rights nonviolently and respectfully. Indeed, the trial judge commented after respondent Bryan asserted the privilege: "I don't

crucial element in respondents' refusal to answer questions foreclosed application of subdivision (a) by the trial judge.

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consider him to have a chip on his shoulder towards the Court or towards me." App. 32.

PHELPS, RECEIVER IN BANKRUPTCY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74–121. Argued April 16, 1975—Decided May 19, 1975

After the Internal Revenue Service (IRS) had made federal tax assessments against a company and the company failed to pay the taxes after formal demand, the company transferred its assets to an assignee for the benefit of creditors, who converted the assets into cash. The IRS then filed a notice of tax lien respecting the assessments and served a levy notice on the assignee, who did not, however, comply with the IRS's payment demand. The company was thereafter adjudicated bankrupt and petitioner receiver in bankruptcy made application to the bankruptcy Referee for an order requiring the assignee to turn over the cash proceeds. The IRS opposed the application on the ground that the bankruptcy court lacked jurisdiction over the subject matter of the application because the United States was entitled to possession of the cash proceeds held by the bankrupt's assignee. The Referee rejected the IRS's contention, holding that the assignment passed inalienable title to the assets of the company to the assignee, and the District Court upheld the Referee. The Court of Appeals reversed. *Held:* The United States, by serving the bankrupt taxpayer's assignee with a valid notice of levy took constructive custody of the cash proceeds in the assignee's possession, and neither the bankrupt nor petitioner as receiver could assert a claim to those proceeds. The receiver's recourse is limited to a plenary suit under § 23 of the Bankruptcy Act. Pp. 333–337.

495 F. 2d 1283, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Dennis E. Quaid argued the cause for petitioner. With him on the briefs were *Kevin J. Gillogly* and *Daniel C. Ahern.*

Keith A. Jones argued the cause for the United States. With him on the brief were *Solicitor General Bork, As-*

sistant Attorney General Crampton, and *Crombie J. D. Garrett.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Between March and June 1971 the Internal Revenue Service (IRS) made assessments of federal taxes in the amount of $140,831.59 against Chicagoland Ideel Cleaners, Inc. Chicagoland failed to pay the taxes after formal demand. Instead, on June 28, 1971, Chicagoland transferred its assets to an assignee for the benefit of creditors. The assignee promptly converted the assets into cash of approximately $38,000. On August 25, 1971, the IRS filed a notice of tax lien respecting the March-June assessments in the office of the Recorder of Deeds of Cook County, Ill., and on the same day served a notice of levy on the assignee. The notice of levy stated that the proceeds in the assignee's hands "are hereby levied upon and seized for satisfaction" of the taxes, "and demand is hereby made upon you for the [proceeds]." On September 14, 1971, an involuntary petition in bankruptcy was filed against Chicagoland. Chicagoland was adjudicated bankrupt and petitioner Phelps was appointed receiver in bankruptcy.

Petitioner receiver, on October 19, 1971, filed an application with the Referee in Bankruptcy for an order requiring the assignee, who had not complied with the IRS demand for payment, to turn over to petitioner the $38,000 proceeds from the sale of Chicagoland's assets. The IRS opposed the application on the ground that "[t]his court of bankruptcy lacks jurisdiction over the subject matter of the application because the United States is entitled to the possession of the moneys now held by [the] assignee of the bankrupt. . . ." The Referee in Bankruptcy rejected the contention, holding that "the

assignment . . . passed inalienable title to the assets of Chicagoland . . . to the assignee" and therefore "the notice of levy of the Internal Revenue Service is a nullity . . . ." The Referee accordingly entered an order directing the assignee to "surrender and turn over to" petitioner "all sums in his possession . . . ." The District Court for the Northern District of Illinois, on petition for review on behalf of the IRS, approved the Referee's turnover order. The Court of Appeals for the Seventh Circuit reversed. 495 F. 2d 1283 (1974). The Court of Appeals held: "Since possession of the property resided in the United States as against the [petitioner] receiver, the bankruptcy court lacked jurisdiction summarily to adjudicate the controversy without the Government's consent. . . . The United States is now entitled to have its claim adjudicated in a plenary suit. We respectfully decline to follow the contrary holding [of the Court of Appeals for the Ninth Circuit] in In re United General Wood Products Corp., 483 F. 2d 975 (9th Cir. 1973)." 495 F. 2d, at 1285–1286. We granted certiorari to resolve the conflict between the Courts of Appeals, 419 U. S. 1068 (1974).[1] We agree with the holding of the

[1] The grant was limited to the following questions presented in the petition:

"1. 'Whether the Court of Appeals incorrectly granted to the United States a priority based upon the Internal Revenue Code of 1954 for taxes in violation of and contrary to the priorities for payment of claims established by the Bankruptcy Act?'

"2. 'Whether the Court of Appeals incorrectly held that service of a Notice of Levy upon an assignee for the benefit of creditors subsequent to the assignment reduced the bankrupt's property then held by the assignee to the constructive possession of the United States?'

"3. 'Whether the Court of Appeals incorrectly determined that the Bankruptcy Court lacked summary jurisdiction to adjudicate the controversy before it without the consent of the United States?'"

Court of Appeals for the Seventh Circuit and affirm its judgment.[2]

I

The assignee claims no interest in the proceeds of the $38,000. The Court of Appeals for the Ninth Circuit, in *In re United General Wood Products Corp.*, 483 F. 2d 975, 976 (1973), held that that circumstance, without more, subjected property to the bankruptcy court's summary jurisdiction to enter a turnover order. *Wood Products Corp.* relied on the statement in *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 432–433 (1924), that constructive possession of the property by the bankruptcy court "exists . . . where the property is held by some other person who makes no claim to it." That reliance is misplaced. The statement read in the context of the facts of that case and its holding applied only to property in the hands of a nonadverse

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[2] There is a significant difference in the result of a summary adjudication of the tax claim in the bankruptcy court and the result of its adjudication in a plenary suit:

"The difference between a summary and plenary proceeding in this context is not merely a matter of the relative formality of the respective procedures. The consequence of a summary turnover order is to subject the property in question to administration as part of the bankrupt estate. Where the government has a tax lien on the property, the consequence of the turnover is to subordinate that lien to the expenses of administration and priority wage claims. See Section 67c (3) of the Bankruptcy Act, 11 U. S. C. [§] 107 (c)(3). In contrast, if the property is not subject to summary turnover, it may be brought into the bankrupt estate only if the receiver is able to defeat the government's underlying tax claim in a plenary proceeding, *i. e.*, a suit for refund. Thus, in a case where the underlying tax claim is sound, for the government the difference between a summary and a plenary proceeding is the difference between holding the property subject to prior payment of administrative and priority wage claims and holding it outright." Brief for United States 19.

third person who was not holding it as agent for a bona fide adverse claimant. *Taubel* itself held that the bankruptcy court had not been given jurisdiction by summary proceedings to avoid a lien created by levy under a judgment of a state court where the sheriff possessed the property for the judgment creditor, and neither he nor the judgment creditor had consented to adjudication of the controversy by the bankruptcy court. Similarly, in this case the United States is a bona fide adverse claimant to the $38,000 proceeds held by the assignee and has not consented to adjudication of its claim by the bankruptcy court.

The levy of August 25, 1971, created a custodial relationship between the assignee and the United States and thereby reduced the $38,000 to the United States' constructive possession. Neither Chicagoland nor the petioner as receiver could assert a claim to the proceeds in that circumstance. For when Chicagoland failed to pay the taxes after assessment and demand, a lien in favor of the United States attached to "all property and rights to property, whether real or personal, belonging to [the taxpayer]." 26 U. S. C. § 6321. The assignee took Chicagoland's property subject to this lien.[3] The lien attached to the proceeds of the sale.[4] See *Sheppard* v. *Taylor*, 5 Pet. 675, 710 (1831); *Loeber* v. *Leininger*, 175 Ill. 484, 51 N. E. 703 (1898). "The lien reattaches to the thing and to whatever is substituted for it. . . . The owner and the lien holder, whose claims have been

[3] The unfiled tax lien was valid against all persons except purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. 26 U. S. C. § 6323 (a). Petitioner concedes that the assignee did not fall within any of these categories.

[4] The Government does not contend that the unfiled lien followed the property into the hands of good-faith purchasers from the assignee. Brief for United States 14 n. 5. As indicated in n. 3, *supra*, an unfiled tax lien is invalid against purchasers.

wrongfully displaced, may follow the proceeds wherever they can distinctly trace them." *Sheppard* v. *Taylor, supra,* at 710.[5]

The notice of levy and demand served on the assignee were an authorized means of collecting the taxes from the $38,000 held by him. Title 26 U. S. C. § 6331 (a) provides: "[I]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary . . . to collect such tax . . . by levy upon all property . . . on which there is a [tax] lien . . ."; "[t]he term 'levy' . . . includes the power of distraint and seizure by any means." § 6331 (b). Treasury Regulations, 26 CFR § 301.6331–1 (a) (1) (1974), provide that a "[l]evy may be made by serving a notice of levy," and that levy gave the United States the right to the proceeds. See *United States* v. *Pittman,* 449 F. 2d 623, 627 (CA7 1971). Title 26 U. S. C. § 6332 (a) requires that any person holding property levied upon must surrender it to the Government, or become liable for the tax, § 6332 (c). With surrender, however, any duty owed the taxpayer is extinguished. § 6332 (d).

Thus, following the levy of August 25, 1971, actual possession of the $38,000 was held by the assignee on behalf of the United States and "where possession is assertedly held not for the bankrupt, but for others prior to bankruptcy . . . the holder is not subject to summary

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[5] *United States* v. *Bess,* 357 U. S. 51 (1958), is not to the contrary. *Bess* held that a tax lien effected during an insured's life against the cash surrender value of a life insurance policy attached after his death to insurance proceeds in the hands of the beneficiary but only in the amount of the cash surrender value. The limitation recognized that the taxpayer in his lifetime could not have realized a larger amount and thus there was no greater "property" or "rights to property" to which the lien could have attached *ab initio. Id.,* at 55–56.

jurisdiction." 2 J. Moore & R. Oglebay, Collier on Bankruptcy ¶ 23.06 [3], pp. 506.2–506.3 (14th ed. 1975);[6] *Cline* v. *Kaplan*, 323 U. S. 97 (1944); *Galbraith* v. *Vallely*, 256 U. S. 46 (1921). The receiver's recourse is limited to a plenary suit under § 23 of the Bankruptcy Act, 11 U. S. C. § 46. See *Taubel-Scott-Kitzmiller Co.* v. *Fox, supra.*

Petitioner argues, however, that actual possession is necessary to remove the Government's tax liens from the subordinate priority accorded them under § 67c (3) of the Bankruptcy Act.[7] The argument is without merit. *United States* v. *Eiland*, 223 F. 2d 118 (CA4 1955); *Rosenblum* v. *United States*, 300 F. 2d 843 (CA1 1962). Section 67c (3) has no bearing on the question of summary jurisdiction; it relates only to the priority that is accorded tax liens on property that has already been determined to be within the bankruptcy court's jurisdiction as part of the bankrupt estate. Here we are concerned not with priority of tax liens but with the effect of a tax

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[6] The claimant may, however, consent to summary adjudication in the bankruptcy court. *Cline* v. *Kaplan*, 323 U. S. 97, 99 (1944). The United States refused consent in this case.

[7] Section 67c (3) of the Bankruptcy Act, 11 U. S. C. § 107 (c)(3), provides in pertinent part:

"Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this title . . . ."

Section 64 of the Bankruptcy Act, 11 U. S. C. § 104, provides in pertinent part:

"(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration . . . , (2) wages and commissions, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling, or city salesmen . . . ."

levy. Historically, service of notice has been sufficient to seize a debt, *Miller* v. *United States,* 11 Wall. 268, 297 (1871), and notice of levy and demand are equivalent to seizure. See, *e. g., Sims* v. *United States,* 359 U. S. 108 (1959). The levy, therefore, gave the United States full legal right to the $38,000 levied upon as against the claim of the petitioner receiver.

Petitioner's final contention is that the general restriction on a bankruptcy court's summary jurisdiction was altered by the enactment in 1938 of § 2a (21) of the Bankruptcy Act, 11 U. S. C. § 11 (a)(21), which grants bankruptcy courts jurisdiction to "[r]equire . . . assignees for the benefit of creditors . . . to deliver the property in their possession or under their control to the receiver . . . ." This provision, however, was designed to "clarif[y] the jurisdiction of the [bankruptcy] court," S. Rep. No. 1916, 75th Cong., 3d Sess., 12 (1938), and was "simply declaratory of prior case law," 1 Collier on Bankruptcy, *supra,* ¶ 2.78 [3], p. 390.26. Under that case law, an assignee for the benefit of creditors who holds assets as "a mere naked bailee for the creditors . . . has no right to retain the possession as against the trustee in bankruptcy." *In re McCrum,* 214 F. 207, 209 (CA2 1914). Here the assignee held as custodian for the United States, a bona fide adverse claimant. *Galbraith* v. *Vallely, supra.*[8]

Affirmed.

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[8] Petitioner also relies on § 70a (8) of the Bankruptcy Act, 11 U. S. C. § 110 (a)(8). Section 70a (8) vests the trustee of the bankrupt's estate "with the title of the bankrupt as of the date of the filing of the petition . . . to . . . property held by an assignee for the benefit of creditors." Even petitioner argues, however, that Chicagoland on September 1, 1971, had no title to the property conveyed to the assignee. Brief for Petitioner 14. In any event, the pre-bankruptcy levy displaced any title of Chicagoland, and § 70a (8) is therefore inapplicable.

VAN LARE, ACTING COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* HURLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK

No. 74–453. Argued March 26, 1975—Decided May 19, 1975*

Petitioners in No. 74–5054 brought class actions in two District Courts challenging New York's "lodger" regulations, which require a pro-rata reduction in shelter allowance of a family receiving Aid to Families with Dependent Children (AFDC) solely because a parent allows a nonlegally responsible person to reside in the home. Petitioners claimed that the state regulations conflicted with a provision of the Social Security Act, 42 U. S. C. § 606 (a), which in relevant part defines a dependent child as one "who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent," and an implementing regulation, 45 CFR § 233.90 (a), which provides that in determining a child's financial eligibility and the amount of the assistance payment "the income only of the [legally obligated] parent . . . will be considered available . . . in the absence of proof of actual contributions." Petitioners also contended that the state regulations were violative of due process and equal protection. Each District Court held that the New York regulations were in conflict with the federal statutory and regulatory provisions. The Court of Appeals held that there was no such conflict and reversed the judgments and remanded the cases for convention of a three-judge court to decide the constitutional challenges. That court sustained petitioners' due process claim. This Court noted probable jurisdiction of the appeal from the three-judge court holding (No. 74–453) and granted certiorari in the case of the judgment of the Court of Appeals (No. 74–5054). *Held:* The New York "lodger" regulations, which are based on the assumption that the nonpaying lodger is contributing to the welfare of the household, without inquiry into whether he in fact does

*Together with No. 74–5054, *Taylor et al.* v. *Lavine, Commissioner, Department of Social Services of New York, et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

so, violate the Social Security Act and implementing regulations. Pp. 344–348.

(a) A State is barred from assuming that nonlegally responsible persons will apply their resources to aid the welfare child, *King* v. *Smith*, 392 U. S. 309; *Lewis* v. *Martin*, 397 U. S. 552, yet under the New York regulations the nonpaying lodger's mere presence results in a decrease in benefits though he may contribute nothing to the needy child. Pp. 346–347.

(b) The New York regulations cannot be justified on the ground that the lodger's presence establishes the existence of excess space because if that were so the allowance would remain reduced after the lodger leaves, which is not the case. P. 347.

(c) The regulations do not prohibit lodgers from living in welfare homes and therefore cannot be justified on the ground that they are designed to prevent lodgers (who are ineligible for welfare) from receiving welfare benefits. Pp. 347–348.

No. 74–453, 380 F. Supp. 167, vacated and remanded; No. 74–5054, 497 F. 2d 1208, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 348.

Judith A. Gordon, Assistant Attorney General of New York, argued the cause for appellants in No. 74–453 and respondents in No. 74–5054. With her on the briefs were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.

Martin A. Schwartz argued the cause and filed a brief for appellees in No. 74–453 and petitioners in No. 74–5054.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether New York regulations reducing pro rata the shelter allowance provided recipients of Aid to Families with Dependent Children (AFDC) to the extent there are nonpaying lodgers liv-

ing in the household conflict with the Social Security Act and federal regulations. We conclude that the state provisions conflict with federal law and are therefore invalid. *King* v. *Smith*, 392 U. S. 309 (1968); *Lewis* v. *Martin*, 397 U. S. 552 (1970); *Townsend* v. *Swank*, 404 U. S. 282 (1971).

I

AFDC is a categorical public assistance program established by the Social Security Act of 1935. Its operation has been described in several recent opinions. See, *e. g.*, *Rosado* v. *Wyman*, 397 U. S. 397, 408 (1970); *King* v. *Smith*, *supra*, at 313. AFDC provides federal funds to States on a matching funds basis to aid the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with" any of the several listed relatives. 42 U. S. C. § 606 (a). States that seek to qualify for federal AFDC funding must operate a program not in conflict with the Social Security Act. *Townsend* v. *Swank*, *supra*, at 286.

Each of the petitioners in No. 74–5054 receives AFDC on behalf of herself and her minor children. This includes a shelter allowance computed as an item of need separate from other necessities such as food and clothing. N. Y. Soc. Serv. Law § 131–a. Each petitioner's shelter allowance was reduced by New York officials because she allowed a person not a recipient of AFDC and who had no legal obligation to support her family to reside in the household.[1] The reduction was authorized by New York regulations which provide:

"18 N. Y. C. R. R. § 352.31:

[1] Petitioner Hurley's lodger was an unrelated male friend, petitioner Taylor's was her sister, and petitioner Otey's was her 23-year-old son.

"(a) For applicant or recipient.

. . . . .

"(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional or transient basis, his available income and resources shall be applied in accordance with the following:

. . . . .

"(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30 (d)." [2]

"18 N. Y. C. R. R. § 352.30:

"352.30 Persons included in the budget.

. . . . .

"(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a

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[2] Effective July 26, 1974, after the Court of Appeals decision in No. 74–5054, § 352.31 (a)(3) was amended to provide:

"(3) When an applicant or recipient is living, other than on an occasional or transient basis, with a person to whom such applicant or recipient is not married, the available income and resources of such person shall be applied in accordance with the following:

. . . . .

"(iv) When the person is unwilling to assume responsibility for the applicant or recipient or his or her children and there are no children for whom such person is legally responsible, such person shall be treated as a lodger in accordance with subdivision (d) of section 352.30 of this Part."

Even prior to this amendment, the pro rata reduction in shelter allowance was applied without regard to the gender of the nonpaying lodger. See n. 1, *supra*. This was apparently because the reductions were pursuant to 18 N. Y. C. R. R. § 352.30 (d), which makes no reference to gender.

> lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger, the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.*" (Emphasis supplied.)

No lodger of any petitioner contributed $15 a month, and pursuant to the italicized sentence, each petitioner's shelter allowance was therefore reduced by a pro rata share. For example, the shelter allowance of $150 monthly being paid to a family of four was reduced to $120 after the lodger moved in.

Petitioners challenged the New York regulations in separate actions in two Federal District Courts.[3] They alleged that in making the presence of the lodger a basis for assuming the availability of income, the regulations were invalid for conflict with 42 U. S. C. § 606 (a), *supra*, and the following regulation, 45 CFR § 233.90 (a) (1974), that implements that statute:

"A State plan under title IV–A of the Social Se-

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[3] Petitioner Hurley's action was brought in the District Court for the Southern District of New York. *Hurley* v. *Van Lare*, 72 Civ. 3423. Petitioners Taylor and Otey brought their action in the Eastern District of New York. *Taylor* v. *Lavine*, 73 Civ. 699. Each District Court certified class action status for the case before it, the class consisting of "all residents of the State of New York who are or were or will be receiving public assistance, and who have had their grants of public assistance reduced, terminated, suspended or denied, or who are or may be threatened with reduction, termination, suspension, or denial of public assistance, solely because of the presence of a noncontributing lodger in the home pursuant to 18 NYCRR §§ 352.31 (a)(3)(iv) and 352.30 (d)." App. 99, 144.

curity Act [relating to the AFDC program] must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extend [*sic*] that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. *In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.*" (Emphasis supplied.)

Without reaching the recipients' constitutional challenges—denial of due process and equal protection, and infringement of rights of privacy and free association—each District Court adjudged the state regulations to be invalid for conflict with 42 U. S. C. § 606 (a) and 45 CFR § 233.90 (a), *supra*, and granted declaratory and

injunctive relief.[4] Both judgments were appealed to the Court of Appeals for the Second Circuit. The Court of Appeals held that the New York rules were not in conflict with federal law, reversed the judgments, and remanded for convention of a three-judge court to decide the constitutional challenges. *Taylor* v. *Lavine*, 497 F. 2d 1208 (1974). The three-judge court that was convened sustained the due process challenge to the New York rules. 380 F. Supp. 167 (ED & SDNY 1974). We noted probable jurisdiction of appellants' appeal from the three-judge court holding, 419 U. S. 1045 (1974) (No. 74–453), and also granted certiorari to the judgment of the Court of Appeals. 419 U. S. 1046 (1974) (No. 74–5054). We hold that the Court of Appeals erred in No. 74–5054 and reverse. Since in that circumstance we need not address the constitutional decision in No. 74–453, we vacate the judgment in that case and remand with directions to dismiss as moot. Cf. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

II

Title 42 U. S. C. § 606 (a) was previously construed in *King* v. *Smith*, 392 U. S. 309 (1968). That case involved an Alabama "substitute father" regulation, which denied AFDC benefits to children of a mother who cohabited in or outside her home with an able-bodied man. It was irrelevant under the state regulation whether the man was legally obligated to support the children or whether he did in fact contribute to their support. Alabama contended that its rule simply defined nonabsent "parent" under 42 U. S. C. § 606 (a). The regulation was claimed to be justified as having the purpose of

[4] *Hurley* v. *Van Lare*, 365 F. Supp. 186 (SDNY 1973). The opinion of the District Judge in *Taylor* v. *Lavine*, *supra*, is unreported.

discouraging illicit sexual relationships and of putting "informal" families on a par with ordinary families. We concluded that this was an insufficient justification, holding that it is "inconceivable . . . that Alabama is free to discourage immorality and illegitimacy by the device of absolute disqualification of needy children." *King* v. *Smith, supra,* at 326. For, in light of the purpose of AFDC to aid needy children, we held, on the statutory language and legislative history, that the term "parent" in § 606 (a) must be read to include "only those persons with a legal duty of support." 392 U. S., at 327. A broader definition would fail to provide the economic security for needy children which was Congress' primary goal. *Id.,* at 329–330. Thus the Alabama regulation was invalid because its definition of "parent" conflicted with that of the Social Security Act. *Id.,* at 333.

The Department of Health, Education, and Welfare (HEW) codified the holding of *King* v. *Smith* in 45 CFR § 233.90 (a), *supra,* the regulation at issue in the instant case.[5] Its key provision specifies that in determining a child's financial eligibility and the amount of the assistance payment, "the income only of the [legally obligated] parent . . . will be considered available . . . in the absence of proof of actual contributions." 45 CFR § 233.90 (a). We applied this regulation in *Lewis* v. *Martin,* 397 U. S. 552 (1970). *Lewis* presented the question of the validity of a California rule which provided that in computing payments to needy children who lived with their mother and stepfather or "an adult male person assuming the role of spouse" (MARS), consideration should be given to the income of the stepfather or MARS. *Id.,* at 554. We held the California rule invalid as in conflict with the Social Security Act, the HEW regu-

[5] As originally phrased, the regulation was numbered 45 CFR § 203.1. See *Lewis* v. *Martin,* 397 U. S. 552, 556 (1970).

lation, 45 CFR § 233.90 (a), and *King* v. *Smith*, *supra*. We said that "[i]n the absence of proof of actual contribution, California may not consider the child's 'resources' to include either the income of a nonadopting stepfather who is not legally obligated to support the child as is a natural parent, or the income of a MARS—whatever the nature of his obligation to support." 397 U. S., at 559–560. In short, we held that the Social Security Act precludes treating a person who is not a natural or adoptive parent as a breadwinner "unless the bread is actually set on the table." *Id.*, at 559.

III

Thus the New York regulations at issue are also invalid. This is clearly so insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so. Section 352.31 (a)(3), *supra*, provides that "[w]hen a . . . recipient is living with a man to whom she is not married . . . *his available income and resources shall be applied in accordance with the following* . . . (iv) . . . he shall be treated as a lodger in accordance with section 352.30 (d)." (Emphasis supplied.) Plainly treating someone as a lodger is an impermissible means of "applying available income and resources." Under § 352.30 (d), *supra*, when a lodger pays less than $15 a month, the family's shelter allowance is reduced pro rata. Respondents themselves concede in this Court that the regulations are designed so that the lodger will not "be excused from providing his share of shelter cost." Brief for Respondents in Opposition to Pet. for Cert. 9.

Thus under the New York regulations the nonpaying lodger's mere presence results in a decrease in benefits. Yet the lodger, like the Alabama "substitute father" or the California "MARS," may be contributing nothing to

the needy child. *King* v. *Smith, supra,* and *Lewis* v. *Martin, supra,* construe the federal law and regulations as barring the States from assuming that nonlegally responsible persons will apply their resources to aid the welfare child. Those cases therefore compel a reversal of the judgment of the Court of Appeals.

Respondents argue, however, that in any event the New York regulations may be justified on other grounds. They argue first that the presence of the lodger is evidence that the AFDC family has excess room and therefore that its shelter allowance exceeds its needs. That, however, is not how the New York regulations are applied. When a nonpaying lodger moves in, the shelter allowance is reduced pro rata with no regard to space considerations. When the lodger moves out the allowance is returned to its original amount. That practice clearly reveals that the existence of excess space is not the basis of the reduction, because otherwise the allowance would remain reduced after the lodger leaves. Thus, the fact that the allowance varies with the lodger's presence demonstrates that it is keyed, as the regulations plainly imply, to the impermissible assumption that the lodger is contributing income to the family.[6]

Another, somewhat related, justification asserted is that the shelter allowance is reduced to prevent lodgers, who by definition are ineligible for welfare, from receiving welfare benefits. The regulations, however, do not prohibit lodgers from living in welfare homes. The lodger may stay on after the allowance is reduced, and the State takes no further action.[7] The only victim of

[6] Indeed it would seem implausible to assume that the presence of a lodger establishes beyond peradventure the existence of excess space. A lodger might simply be sleeping on the couch in an already overcrowded apartment.

[7] "Proration of the shelter allowance lowers the amount of money available to the welfare family, but it does not prevent the family

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the state regulations is thus the needy child who suffers reduced benefits. But States may not seek to accomplish policies aimed at lodgers by depriving needy children of benefits. *King* v. *Smith, supra,* at 326; *Lewis* v. *Martin, supra.*

The judgment in No. 74–5054 is reversed and the judgment in No. 74–453 is vacated and remanded with directions to dismiss as moot.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting.

I do not think that the New York nonpaying-lodgers regulation is in conflict with federal statutory law, for the reasons stated by Judge Hays in his opinion for the Court of Appeals for the Second Circuit. *Taylor* v. *Lavine,* 497 F. 2d 1208 (1974). I therefore reach the constitutional issues presented in No. 74–453, and conclude that the regulation is not constitutionally impermissible, for the reasons set forth by Judge Hays in his dissenting opinion in *Hurley* v. *Van Lare,* 380 F. Supp. 167, 177 (ED & SDNY 1974). I would thus affirm in No. 74–5054 and reverse in No. 74–453.

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from providing its lodger with free living space by diverting part of its basic grant to pay the rent. . . . [T]here is evidence that poor families often find the presence of a lodger worth a sacrifice in income." Recent Cases, Welfare Law—AFDC—Proration of Shelter Allowance, 88 Harv. L. Rev. 654, 657 (1975). See also Note, AFDC Income Attribution: The Man-In-the-House and Welfare Grant Reductions, 83 Harv. L. Rev. 1370, 1373–1374 (1970).

Syllabus

MEEK ET AL. *v.* PITTENGER, SECRETARY OF EDUCATION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 73–1765. Argued February 19, 1975—Decided May 19, 1975

The Commonwealth of Pennsylvania is authorized to provide directly to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory-attendance requirements "auxiliary services" (Act 194) and loans of textbooks "acceptable for use in" the public schools (Act 195). Act 195 also provides for loans directly to the nonpublic schools of "instructional materials and equipment, useful to the education" of nonpublic school children. The auxiliary services include counseling, testing, psychological services, speech and hearing therapy, and related services for exceptional, remedial, or educationally disadvantaged students, "and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children" and are provided for those in public schools. The instructional materials include periodicals, photographs, maps, charts, recordings, and films. The instructional equipment includes projectors, recorders, and laboratory paraphernalia. Appellants brought this suit in the District Court challenging the constitutionality of both Acts. The court upheld the constitutionality of the textbook and instructional materials loan programs and the auxiliary services program but invalidated the instructional equipment loan program to the extent that it sanctioned the loan of equipment "which from its nature can be diverted to religious purposes." *Held:* Act 194 and all but the textbook loan provisions of Act 195 violate the Establishment Clause of the First Amendment as made applicable to the States by the Fourteenth. Pp. 359–372; 388.

374 F. Supp. 639, affirmed in part, reversed in part.

MR. JUSTICE STEWART delivered the opinion of the Court with respect to Parts I, II, IV, and V, finding:

1. The direct loan of instructional materials and equipment to nonpublic schools authorized by Act 195 has the unconstitutional primary effect of establishing religion because of the predomi-

nantly religious character of the schools benefiting from the Act since 75% of Pennsylvania's nonpublic schools that comply with the compulsory-attendance law and thus qualify for aid under Act 195 are church related or religiously affiliated. The massive aid that nonpublic schools thus receive is neither indirect nor incidental, and even though such aid is ostensibly limited to secular instructional material and equipment the inescapable result is the direct and substantial advancement of religious activity. Pp. 362–366.

2. Act 194 also violates the Establishment Clause because the auxiliary services are provided at predominantly church-related schools. The District Court erred in holding that such services are permissible because they are only secular, neutral, and nonideological, since excessive entanglement would be required for Pennsylvania to be assured that the public school professional staff members who provide the services do not advance the religious mission of the church-related schools in which they serve. Cf. *Lemon* v. *Kurtzman*, 403 U. S. 602, 618. Pp. 367–372.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, concluded in Part III that Act 195's textbook loan provisions, which are limited to textbooks acceptable for use in the public schools, are constitutional, since they "merely [make] available to all children the benefits of a general program to lend schools books free of charge," and the "financial benefit is to parents and children, not to schools," *Board of Education* v. *Allen*, 392 U. S. 236, 243–244. Pp. 359–362.

MR. JUSTICE REHNQUIST, joined by MR. JUSTICE WHITE, concluded that the textbook loan program of Act 195 is constitutionally indistinguishable from the program upheld in *Board of Education* v. *Allen*, *supra*. P. 388.

STEWART, J., announced the judgment of the Court and delivered an opinion of the Court, in which BLACKMUN and POWELL, JJ., joined, and in all but Part III of which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 373. BURGER, C. J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 385. REHNQUIST, J., filed an opinion concurring in the judgment in part and dissenting in part, in which WHITE, J., joined, *post*, p. 387.

Leo Pfeffer and *William P. Thorn* argued the cause and filed briefs for appellants.

J. Justin Blewitt, Jr., Deputy Attorney General of Pennsylvania, argued the cause for appellees Pittenger et al. With him on the brief was *Israel Packel*, Attorney General. *William Bentley Ball* argued the cause for appellees Diaz et al. With him on the brief were *Joseph G. Skelly, James E. Gallagher, Jr., C. Clark Hodgson, Jr.*, and *William D. Valente*. *Henry T. Reath* argued the cause and filed a brief for appellees Chesik et al.*

MR. JUSTICE STEWART announced the judgment of the Court and delivered the opinion of the Court (Parts I, II, IV, and V), together with an opinion (Part III), in which MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL, joined.

This case requires us to determine once again whether a state law providing assistance to nonpublic, church-related, elementary and secondary schools is constitutional under the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303.

I

With the stated purpose of assuring that every schoolchild in the Commonwealth will equitably share in the benefits of auxiliary services, textbooks, and instructional

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**Theodore R. Mann, Paul S. Berger, Arnold Forster, Samuel Rabinove, Henry N. Rapaport, David Rubin*, and *Joseph B. Robison* filed a brief for the American Association of School Administrators et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Stuart D. Hubbell* for the Council for American Private Education, and by *Howard Gould* for the National Audio-Visual Association, Inc.

material provided free of charge to children attending public schools,[1] the Pennsylvania General Assembly in 1972 added Acts 194 and 195, July 12, 1972, Pa. Stat. Ann., Tit. 24, § 9–972, to the Pennsylvania Public School Code of 1949, Pa. Stat. Ann., Tit. 24, §§ 1–101 to 27–2702.

Act 194 authorizes the Commonwealth to provide "auxiliary services" to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory-attendance requirements.[2] "Auxiliary serv-

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[1] See Act 194, § 1 (a), Pa. Stat. Ann., Tit. 24, § 9–972 (a); Act 195, § 1 (a), Pa. Stat. Ann., Tit. 24, § 9–972 (a).

[2] Act 194 provides:

"(a) Legislative Finding; Declaration of Policy. The welfare of the Commonwealth requires that the present and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective, the Commonwealth provides, through tax funds of the Commonwealth, auxiliary services free of charge to children attending public schools within the Commonwealth. Approximately one quarter of all children in the Commonwealth, in compliance with the compulsory attendance provisions of this act, attend nonpublic schools. Although their parents are taxpayers of the Commonwealth, these children do not receive auxiliary services from the Commonwealth. It is the intent of the General Assembly by this enactment to assure the providing of such auxiliary services in such a manner that every school child in the Commonwealth will equitably share in the benefits thereof.

"(b) Definitions. The following terms, whenever used or referred to in this section, shall have the following meanings, except in those circumstances where the context clearly indicates otherwise:

" 'Nonpublic school' means any school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88–352).

" 'Auxiliary services' means guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as,

ices" include counseling, testing, and psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the educationally disadvantaged, "and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Act 194 specifies that the teaching and services are to be provided in the nonpublic schools themselves by personnel drawn from the appropriate "intermediate unit," part of the public school system of the Commonwealth established to provide special services to local school districts. See Pa. Stat. Ann., Tit. 24, §§ 9–951 to 9–971.

Act 195 authorizes the State Secretary of Education, either directly or through the intermediate units, to lend textbooks without charge to children attending nonpublic elementary and secondary schools that meet the Common-

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but not limited to, teaching English as a second language), and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"(c) Provision of Services. Pursuant to rules and regulations established by the secretary, each intermediate unit shall provide auxiliary services to all children who are enrolled in grades kindergarten through twelve in nonpublic schools wherein the requirements of the compulsory attendance provisions of this act may be met and which are located within the area served by the intermediate unit, such auxiliary services to be provided in their respective schools. The secretary shall each year apportion to each intermediate unit an amount equal to the cost of providing such services but in no case shall the amount apportioned be in excess of thirty dollars ($30) per pupil enrolled in nonpublic schools within the area served by the intermediate unit."

The Pennsylvania Public School Code of 1949 provides that the requirements of the compulsory-attendance law may be met at a nonpublic school so long as "the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language." Pa. Stat. Ann., Tit. 24, § 13–1327.

wealth's compulsory-attendance requirements.[3] The books that may be lent are limited to those "which are acceptable for use in any public, elementary, or secondary school of the Commonwealth."

Act 195 also authorizes the Secretary of Education, pursuant to requests from the appropriate nonpublic school officials, to lend directly to the nonpublic schools "instructional materials and equipment, useful to the education" of nonpublic school children.[4] "Instructional

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[3] The sections of Act 195 relating to the loan of textbooks provide:

"(b) Definitions. . . . 'Textbooks' means books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

"(c) Loan of Textbooks. The Secretary of Education directly, or through the intermediate units, shall have the power and duty to purchase textbooks and, upon individual request, to loan them to all children residing in the Commonwealth who are enrolled in grades kindergarten through twelve of a nonpublic school wherein the requirements of the compulsory attendance provisions of this act may be met. Such textbooks shall be loaned free to such children subject to such rules and regulations as may be prescribed by the Secretary of Education.

"(d) Purchase of Books. The secretary shall not be required to purchase or otherwise acquire textbooks, pursuant to this section, the total cost of which, in any school year, shall exceed an amount equal to ten dollars ($10) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year are enrolled in grades kindergarten through twelve of a nonpublic school within the Commonwealth in which the requirements of the compulsory attendance provisions of this act may be met."

[4] The sections of Act 195 relating to the direct loan of instructional material and equipment provide:

"(b) Definitions. . . . 'Instructional equipment' means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or

materials" are defined to include periodicals, photographs, maps, charts, sound recordings, films, "or any other printed and published materials of a similar nature." "Instructional equipment," as defined by the Act, includes projection equipment, recording equipment, and laboratory equipment.

On February 7, 1973, three individuals and four organizations [5] filed a complaint in the District Court for the

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teachers. The term includes but is not limited to projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment as may be of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

"'Instructional materials' means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes, and video tapes, or any other printed and published materials of a similar nature made by any method now developed or hereafter to be developed. The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

. . . . .

"(e) Purchase of Instructional Materials and Equipment. Pursuant to requests from the appropriate nonpublic school official on behalf of nonpublic school pupils, the Secretary of Education shall have the power and duty to purchase directly, or through the intermediate units, or otherwise acquire, and to loan to such nonpublic schools, instructional materials and equipment, useful to the education of such children, the total cost of which, in any school year, shall be an amount equal to but not more than twenty-five dollars ($25) multiplied by the number of children residing in the Commonwealth who on the first day of October of such school year, are enrolled in grades kindergarten through twelve of a nonpublic school in which the requirements of the compulsory attendance provisions of this act may be met."

[5] The individual plaintiffs are Sylvia Meek, Bertha G. Myers, and Charles A. Weatherley; all are resident taxpayers of the Common-

Eastern District of Pennsylvania challenging the constitutionality of Acts 194 and 195, and requesting an injunction prohibiting the expenditure of any funds under either statute. The complaint alleged that each Act "is a law respecting an establishment of religion in violation of the First Amendment" because each Act "authorizes and directs payments to or use of books, materials and equipment in schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, and (10) impose religious restrictions on what the faculty may teach." The Secretary of Education and the Treasurer of the Commonwealth were named as the defendants.[6]

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wealth of Pennsylvania. The organizational plaintiffs are the American Civil Liberties Union, the National Association for the Advancement of Colored People, the Pennsylvania Jewish Community Relations Council, and Americans United for Separation of Church and State; each group has members who are taxpayers of Pennsylvania. 374 F. Supp. 639, 643. The District Court properly concluded that both the individual and the organizational plaintiffs had standing to bring this challenge to Acts 194 and 195. 374 F. Supp., at 647; see *Flast* v. *Cohen*, 392 U. S. 83; *Sierra Club* v. *Morton*, 405 U. S. 727.

[6] The original defendants were John C. Pittenger, Secretary of Education of Pennsylvania, and Grace M. Sloan, Treasurer of Pennsylvania. A number of additional parties were permitted by the District Court to intervene as defendants. Some of the individual intervenors are parents of children attending nonpublic, nonsectarian schools, who receive benefits under the challenged Acts either directly or through their schools; others are the parents of children

A three-judge court was convened pursuant to 28 U. S. C. §§ 2281, 2284. After an evidentiary hearing, the court entered its final judgment. 374 F. Supp. 639. In that judgment the court unanimously upheld the constitutionality of the textbook loan program authorized by Act 195. 374 F. Supp., at 657–658. By a divided vote the court also upheld the constitutionality of Act 194's provision of auxiliary services to children in nonpublic elementary and secondary schools and Act 195's authorization of loans of instructional materials directly to nonpublic elementary and secondary schools. 374 F. Supp., at 653–659. The court unanimously invalidated that portion of Act 195 authorizing the expenditure of commonwealth funds for the purchase of instructional equipment for loan to nonpublic schools, but only to the extent that the provision allowed the loan of equipment "which from its nature can be diverted to religious purposes." 374 F. Supp., at 662. The court gave as examples projection and recording equipment. *Id.*, at 660–661. By a vote of 2–1, the court upheld this provision of Act 195 insofar as it authorizes the loan of instructional equipment that cannot be readily diverted to religious uses. 374 F. Supp., at 660–661.

Except with respect to that provision of Act 195 which permits loan of instructional equipment capable of diversion, therefore, the plaintiffs' request for preliminary and final injunctive relief was denied. The plaintiffs (hereinafter the appellants) appealed directly to this Court, pursuant to 28 U. S. C. § 1253.[7] We noted probable jurisdiction. 419 U. S. 822.

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attending nonpublic, church-related schools, who are benefited directly or indirectly by the Acts. One organizational intervenor is an association of nonpublic, nonsectarian schools; the other organizational intervenor is a nonpublic, nonsectarian school. 374 F. Supp., at 643.

[7] The appellants had alleged in their complaint that the statutes

II

In judging the constitutionality of the various forms of assistance authorized by Acts 194 and 195, the District Court applied the three-part test that has been clearly stated, if not easily applied, by this Court in recent Establishment Clause cases. See, *e. g., Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 772–773; *Lemon* v. *Kurtzman,* 403 U. S. 602, 612–613. First, the statute must have a secular legislative purpose. *E. g., Epperson* v. *Arkansas,* 393 U. S. 97. Second, it must have a "primary effect" that neither advances nor inhibits religion. *E. g., School District of Abington Township* v. *Schempp,* 374 U. S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. *E. g., Walz* v. *Tax Comm'n,* 397 U. S. 664.

These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize,

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violate the Free Exercise Clause, as well as the Establishment Clause, arguing that compulsory taxation for the support of religious schools interfered with the free exercise of religion. The District Court held that "the impact of whatever min[u]scule burden of taxation which results to [the appellants] from the expenditures in question has no effect upon the free exercise of their religion." *Id.,* at 662. Judge Higginbotham, who concurred in part and dissented in part, did not reach the free exercise question. See *id.,* at 680. The appellants have not renewed their free exercise challenge in this Court. Nor have the appellees sought review of that segment of the District Court order invalidating so much of Act 195 as authorized loans of instructional equipment capable of being diverted to religious purposes. Consequently, neither of those issues is now before us.

however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired. See *Tilton* v. *Richardson*, 403 U. S. 672, 677–678 (plurality opinion of BURGER, C. J.).

Primary among the evils against which the Establishment Clause protects "have been 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz* v. *Tax Comm'n, supra,* at 668; *Lemon* v. *Kurtzman, supra,* at 612." *Committee for Public Education & Religious Liberty* v. *Nyquist, supra,* at 772. The Court has broadly stated that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson* v. *Board of Education,* 330 U. S. 1, 16. But it is clear that not all legislative programs that provide indirect or incidental benefit to a religious institution are prohibited by the Constitution. See *Zorach* v. *Clauson,* 343 U. S. 306, 312; *Lemon* v. *Kurtzman, supra,* at 614. "The problem, like many problems in constitutional law, is one of degree." *Zorach* v. *Clauson, supra,* at 314.

III

The District Court held that the textbook loan provisions of Act 195 are constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education* v. *Allen,* 392 U. S. 236. We agree.

Approval of New York's textbook loan program in the *Allen* case was based primarily on this Court's earlier decision in *Everson* v. *Board of Education, supra,* holding that the constitutional prohibition against laws "respect-

ing an establishment of religion" did not prevent "New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S., at 17. Similarly, the Court in *Allen* found that the New York textbook law "merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools." 392 U. S., at 243–244. The Court conceded that provision of free textbooks might make it "more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution." *Id.*, at 244.

Like the New York program, the textbook provisions of Act 195 extend to all schoolchildren the benefits of Pennsylvania's well-established policy of lending textbooks free of charge to elementary and secondary school students.[8]

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[8] New York in a single statute authorized the loan of textbooks without charge to students attending both public and nonpublic schools. N. Y. Educ. Law § 701; see *Board of Education* v. *Allen*, 392 U. S. 236, 239. The Pennsylvania General Assembly has used two separate provisions of the Public School Code of 1949 to accomplish the same result. Pennsylvania Stat. Ann., Tit. 24, § 8–801, requires that textbooks be provided free of charge for use in the Pennsylvania public schools. Act 195, Pa. Stat. Ann., Tit. 24, § 9–972, provides the authorization for the loan of textbooks to nonpublic elementary and secondary school students. So long as the textbook loan program includes all schoolchildren, those in public as well as those in private schools, it is of no constitutional significance whether the general program is codified in one statute or two. See *Committee*

As in *Allen*, Act 195 provides that the textbooks are to be lent directly to the student, not to the nonpublic school itself, although, again as in *Allen*, the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. See *Board of Education* v. *Allen*, *supra*, at 244 n. 6.[9] Thus, the financial benefit of Pennsylvania's textbook program, like New York's, is to parents and children, not to the nonpublic schools.[10]

Under New York law the books that could be lent were limited to textbooks "which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities." N. Y. Educ. Law § 701 (3). The law was construed by the New York Court of Appeals to apply solely to secular textbooks. *Board of Education* v. *Allen*, 20 N. Y. 2d 109, 117, 228 N. E. 2d 791, 794. Act 195 similarly limits the books that may be lent to "textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth." [11] Moreover, the record in the case

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for Public Education & Religious Liberty v. *Nyquist*, 413 U. S. 756, 782 n. 38.

[9] Under both the Pennsylvania and New York textbook programs the nonpublic schools are permitted to store on their premises the textbooks being lent to the students. Compare Department of Education, Commonwealth of Pennsylvania, Guidelines for the Administration of Acts 194 and 195, § 4.6, with *Board of Education* v. *Allen*, *supra*, at 244 n. 6.

[10] In Pennsylvania, as in New York, prior to commencement of the state-supported textbook loan program, the parents of nonpublic school children had to purchase their own textbooks. See 374 F. Supp., at 671 n. 11 (opinion of Higginbotham, J.).

[11] Indeed, under the statutory scheme approved in *Allen*, the books lent to nonpublic school students might never in fact have been approved for use in any public school of the State. The statute per-

before us, like the record in *Allen*, see, *e. g.*, 392 U. S., at 244–245, 248, contains no suggestion that religious textbooks will be lent or that the books provided will be used for anything other than purely secular purposes.

In sum, the textbook loan provisions of Act 195 are in every material respect identical to the loan program approved in *Allen*. Pennsylvania, like New York, "merely makes available to all children the benefits of a general program to lend school books free of charge." As such, those provisions of Act 195 do not offend the constitutional prohibition against laws "respecting an establishment of religion." [12]

IV

Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equip-

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mitted the loan of books initially selected for use by the nonpublic schools themselves, subject only to subsequent approval by "any boards of education." See *Board of Education* v. *Allen*, *supra*, at 269–272 (Fortas, J., dissenting). In contrast, only those books which have the antecedent approval of Pennsylvania school officials qualify for loans under Act 195. 374 F. Supp., at 658.

[12] The New Jersey textbook provisions invalidated in *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, aff'd, 417 U. S. 961, unlike the New York textbook program involved in *Allen* and the Pennsylvania program now before us, were not designed to extend to all schoolchildren of the State, whether attending public or nonpublic schools, the benefits of state-loaned textbooks. Although New Jersey *public* school children were *lent* their textbooks, § 5 of the Nonpublic Elementary and Secondary Education Act, challenged in *Marburger*, provided that the State Commissioner of Education would reimburse the parents of *nonpublic* schoolchildren for money spent to *purchase* secular, nonideological textbooks. The District Court based its decision that the textbook provisions violated the constitutional prohibition against laws "respecting an establishment of religion" on the fact that the assistance provided—reimbursement for purchased textbooks—was not extended to parents of all students, but rather was directed exclusively to parents whose children were enrolled in nonpublic, primarily religious schools. 358 F. Supp., at 36.

ment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth. The appellants assert that such direct aid to Pennsylvania's nonpublic schools, including church-related institutions, constitutes an impermissible establishment of religion.

Act 195 is accompanied by legislative findings that the welfare of the Commonwealth requires that present and future generations of schoolchildren be assured ample opportunity to develop their intellectual capacities. Act 195 is intended to further that objective by extending the benefits of free educational aids to every schoolchild in the Commonwealth, including nonpublic school students who constitute approximately one quarter of the schoolchildren in Pennsylvania. Act 195, § 1 (a), Pa. Stat. Ann., Tit. 24, § 9–972 (a). We accept the legitimacy of this secular legislative purpose. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 609, 613; *Sloan* v. *Lemon*, 413 U. S. 825, 829–830. But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act.[13]

The only requirement imposed on nonpublic schools to qualify for loans of instructional material and equipment is that they satisfy the Commonwealth's compulsory-attendance law by providing, in the English language, the subjects and activities prescribed by the standards of the State Board of Education. Pa. Stat. Ann., Tit. 24, § 13–1327. Commonwealth officials, as a matter of

[13] Because we have concluded that the direct loan of instructional material and equipment to church-related schools has the impermissible effect of advancing religion, there is no need to consider whether such aid would result in excessive entanglement of the Commonwealth with religion through "comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman*, 403 U. S. 602, 619.

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state policy, do not inquire into the religious characteristics, if any, of the nonpublic schools requesting aid pursuant to Act 195. The Coordinator of Nonpublic School Services, the chief administrator of Acts 194 and 195, testified that a school would not be barred from receiving loans of instructional material and equipment even though its dominant purpose was the inculcation of religious values, even if it imposed religious restrictions on admissions or on faculty appointments, and even if it required attendance at classes in theology or at religious services. In fact, of the 1,320 nonpublic schools in Pennsylvania that comply with the requirements of the compulsory-attendance law and thus qualify for aid under Act 195, more than 75% are church-related or religiously affiliated educational institutions. Thus, the primary beneficiaries of Act 195's instructional material and equipment loan provisions, like the beneficiaries of the "secular educational services" reimbursement program considered in *Lemon* v. *Kurtzman,* and the parent tuition-reimbursement plan considered in *Sloan* v. *Lemon,* are nonpublic schools with a predominant sectarian character.[14]

It is, of course, true that as part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities—secular and nonideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establish-

[14] In *Lemon* v. *Kurtzman, supra,* at 610, this Court found that 96% of the nonpublic elementary and secondary school students in Pennsylvania in 1969 attended church-related schools. See also *Sloan* v. *Lemon,* 413 U. S. 825, 830.

ment of religion. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1; *Lemon* v. *Kurtzman, supra*, at 616–617; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 775. But the massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental.

For the 1972–1973 school year the Commonwealth authorized just under $12 million of direct aid to the predominantly church-related nonpublic schools of Pennsylvania through the loan of instructional material and equipment pursuant to Act 195.[15] To be sure, the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use." 374 F. Supp., at 660. But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even

[15] An additional $4,670,000 was appropriated in the 1972–1973 school year for the acquisition of textbooks for loan to nonpublic school students pursuant to Act 195. The total 1972–1973 appropriation under Act 195 was $16,660,000. The appropriation was increased by $900,000 to $17,560,000 for the 1973–1974 school year.

The potentially divisive political effect of aid programs like Act 195, which are dependent on continuing annual appropriations and which generate increasing demands as costs and population grow, was emphasized by this Court in *Lemon* v. *Kurtzman, supra*, at 622–624, and *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 794–798. "[W]hile the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored." *Id.*, at 797–798.

though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair*, 413 U. S. 734, 743.

The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U. S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id.*, at 657 (opinion of BRENNAN, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688–1689. For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 781–783, and n. 39, and thus constitutes an impermissible establishment of religion.[16]

[16] Our conclusion that Act 195's instructional-material and equipment-loan provisions are unconstitutional is directly supported, if not compelled, by this Court's affirmance last Term of *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, aff'd, 417 U. S.

V

Unlike Act 195, which provides only for the loan of teaching material and equipment, Act 194 authorizes the Secretary of Education, through the intermediate units, to supply professional staff, as well as supportive materials, equipment, and personnel, to the nonpublic schools of the Commonwealth. The "auxiliary services" authorized by Act 194—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—are provided directly to nonpublic school children with the appropriate special need. But the services are provided only on the nonpublic school premises, and only when "requested by nonpublic school representatives." Department of Education, Commonwealth of Pennsylvania, Guidelines for the Administration of Acts 194 and 195, § 1.3.

The legislative findings accompanying Act 194 are virtually identical to those in Act 195: Act 194 is intended to assure full development of the intellectual capacities of the children of Pennsylvania by extending the bene-

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961. The *Marburger* District Court invalidated as violating the constitutional prohibition against establishment of religion New Jersey's provision of instructional material and equipment to nonpublic elementary and secondary schools. New Jersey's program did not differ in any material respect from the loan provisions of Act 195. See 358 F. Supp., at 36–37. After finding that the nonpublic schools aided, for the most part, were church-related or religiously affiliated educational institutions, *id.*, at 34, the court held that the program had a primary effect of advancing religion. *Id.*, at 37. The court also held, as did the District Court in the case before us, that excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. *Id.*, at 38–39. This Court's affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight. See *Edelman* v. *Jordan*, 415 U. S. 651, 670–671; cf. *Cincinnati, N. O. & T. P. R. Co.* v. *United States*, 400 U. S. 932, 935 (WHITE, J., dissenting from summary affirmance).

fits of free auxiliary services to all students in the Commonwealth. Act 194, § 1 (a), Pa. Stat. Ann., Tit. 24, § 9–972 (a). The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the auxiliary services are provided on the premises of predominantly church-related schools.[17]

In rejecting the appellants' argument, the District Court emphasized that "auxiliary services" are provided directly to the children involved and are expressly limited to those services which are secular, neutral, and nonideological. The court also noted that the instruction and counseling in question served only to supplement the basic, normal educational offerings of the qualifying nonpublic schools. Any benefits to church-related schools that may result from the provision of such services, the District Court concluded, are merely incidental and indirect, and thus not impermissible. See 374 F. Supp., at 656–657. The court also held that no continuing supervision of the personnel providing auxiliary services would be necessary to establish that Act 194's secular limitations were observed or to guarantee that a member of the auxiliary services staff had not "succumb[ed] to sectarianization of his or her professional work." 374 F. Supp., at 657.

[17] The appellants do not challenge, and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether "the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school . . . ." *Post*, at 386–387.

We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools,[18] like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity.[19] For decisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained.

In *Earley* v. *DiCenso*, a companion case to *Lemon* v. *Kurtzman, supra*, the Court invalidated a Rhode Island statute authorizing salary supplements for teachers of secular subjects in nonpublic schools. The Court expressly rejected the proposition, relied upon by the District Court in the case before us, that it was sufficient for the State to assume that teachers in church-related schools would succeed in segregating their religious beliefs from their secular educational duties.

> "We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. . . .
>
> ". . . But the potential for impermissible fostering of religion is present. . . . The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .

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[18] Because Acts 194 and 195 impose identical qualification requirements, compare Act 194, § 1 (c), Pa. Stat. Ann., Tit. 24, § 9–972 (c), with Act 195, §§ 1 (c), (e), Pa. Stat. Ann., Tit. 24, §§ 9–972 (c), (e), the same schools are eligible for aid under each Act.

[19] More than $14 million was appropriated in the 1972–1973 school year to provide auxiliary services for nonpublic school students pursuant to Act 194. The amount was increased to $17,880,000 for the 1973–1974 school year.

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. . . ." 403 U. S., at 618–619.

The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held, necessarily give rise to a constitutionally intolerable degree of entanglement between church and state. *Id.*, at 619. The same excessive entanglement would be required for Pennsylvania to be "certain," as it must be, that Act 194 personnel do not advance the religious mission of the church-related schools in which they serve. *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29, 40–41, aff'd, 417 U. S. 961.[20]

That Act 194 authorizes state funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this case from *Earley* v. *DiCenso* and *Lemon* v. *Kurtzman*, *supra*. Whether the subject is "remedial reading," "advanced reading," or simply "reading," a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of re-

[20] In addition to invalidating New Jersey's provision of instructional material and equipment to nonpublic schools, see n. 16, *supra*, the District Court in *Marburger* struck down the State's program to supply nonpublic schools with "auxiliary services." New Jersey defined "auxiliary services" in substantially the same manner as Pennsylvania, and the administration of the New Jersey program did not differ significantly from the administration of Act 194. See 358 F. Supp., at 39. The District Court held that the auxiliary services program "is unconstitutional by reason of the church-state administrative entanglement it would produce." *Id.*, at 40. This Court's affirmance of *Marburger* is a decision on the merits as to the constitutionality of New Jersey's auxiliary-services program, and is entitled to precedential weight.

ligion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." 403 U. S., at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities.[21]

The fact that the teachers and counselors providing auxiliary services are employees of the public intermediate unit, rather than of the church-related schools in which they work, does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon* v. *Kurtzman*, 403 U. S., at 618. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. See *id.*, at 618–619.

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[21] The "speech and hearing services" authorized by Act 194, at least to the extent such services are diagnostic, seem to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools. See, *e. g.*, *Everson* v. *Board of Education*, 330 U. S. 1. Although the Act contains a severability clause, Act 194, § 2, in view of the fact that speech and hearing services constitute a minor portion of the "auxiliary services" authorized by the Act, we cannot assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid. See *Sloan* v. *Lemon*, 413 U. S., at 833–834. Indeed, none of the appellees has suggested that the severability clause be utilized to save any portion of Act 194 in the event this Court finds the major substance of the Act constitutionally invalid.

The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.[22]

In addition, Act 194, like the statutes considered in *Lemon* v. *Kurtzman, supra,* and *Committee for Public Education & Religious Liberty* v. *Nyquist, supra,* creates a serious potential for divisive conflict over the issue of aid to religion—"entanglement in the broader sense of continuing political strife." *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S., at 794. The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect. See *Lemon* v. *Kurtzman,* 403 U. S., at 622–623. This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary-services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."

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[22] The presence of auxiliary teachers in church-related schools, moreover, has the potential for provoking controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction. See *Lemon* v. *Kurtzman,* 403 U. S., at 619.

The judgment of the District Court as to Act 194 is reversed; its judgment as to the textbook provisions of Act 195 is affirmed, but as to that Act's other provisions now before us its judgment is reversed.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join in the reversal of the District Court's judgment insofar as that judgment upheld the constitutionality of Act 194 and the provisions of Act 195 respecting instructional materials and equipment, but dissent from Part III and the affirmance of the judgment upholding the constitutionality of the textbook provisions of Act 195.

A three-factor test by which to determine the compatibility with the Establishment Clause of state subsidies of sectarian educational institutions has evolved over 50 years of this Court's stewardship in the field. The law in question must, first, reflect a clearly secular legislative purpose; second, have a primary effect[1] that neither

[1] The Court emphasized in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 783–784, n. 39 (1973), that "primary effect" did not connote a requirement that the Court render an ultimate judgment on the effect of the statute in question. The Court stated:

"Appellees, focusing on the term 'principal or primary effect' which this Court has utilized in expressing the second prong of the three-part test, . . . have argued that the Court must decide in these cases whether the 'primary' effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. . . . We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . ."

advances nor inhibits religion; and, third, avoid excessive government entanglement with religion. But four years ago, the Court, albeit without express recognition of the fact, added a significant fourth factor to the test: "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." *Lemon* v. *Kurtzman*, 403 U. S. 602, 622 (1971). The evaluation of this factor in determining compatibility of a state subsidy law with the Establishment Clause is essential, said the Court, because:

> "In a community where . . . a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, *but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.* . . . The potential divisiveness of such conflict is a threat to the normal political process. . . . It conflicts with our whole history and tradition to permit questions of

the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. . . .

". . . *Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.*

"*The potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. . . .*" *Id.*, at 622–623. (Emphasis added.)

This factor was key in *Kurtzman*'s determination that Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools violated the Establishment Clause. The Pennsylvania statute provided financial support by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. The Rhode Island statute provided a program under which the State paid directly to teachers in nonpublic schools a supplement of 15% of their annual salary.

Committee for Public Education & Religious Liberty v. *Nyquist*, 413 U. S. 756 (1973), decided two years later, emphasized the importance to be attached by judges to this fourth factor: "One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program." *Id.*, at 795. The Court held that the factor applied "with peculiar force to the New York statute now before us." *Id.*, at 796. That statute created three aid programs. The first provided for direct money grants to be used for maintenance and

repair of facilities to ensure the students' welfare, health, and safety. The second established a tuition-reimbursement plan for parents of children attending nonpublic elementary schools. The third provided tax relief for parents not qualifying for tuition reimbursements. Stating that "while the prospect of [political] divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored," *id.*, at 797–798, the Court held that "in light of all relevant considerations," each of the New York programs had a " 'primary effect that advances religion' and offends the constitutional prohibition against laws 'respecting an establishment of religion.' " *Id.*, at 798.

The Court today also relies on the factor of divisive political potential but only as support for its holding that Act 194 is an unconstitutional law "respecting an establishment of religion," stating:

> "In addition, Act 194, like the statutes considered in [*Kurtzman* and *Nyquist*] creates a serious potential for divisive conflict over the issue of aid to religion—'entanglement in the broader sense of continuing political strife.' . . . The recurrent nature of the appropriation process guarantees annual reconsideration of Act 194 and the prospect of repeated confrontation between proponents and opponents of the auxiliary-services program. The Act thus provides successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect." *Ante*, at 372.

Contrary to the plain and explicit teaching of *Kurtzman* and *Nyquist*, however, and inconsistently with its own treatment of Act 194, the plurality, in considering

the constitutionality of Act 195 says not a single word about the political-divisiveness factor in Part III of the opinion upholding the textbook loan program created by that Act, and makes only a passing footnote reference to the factor, without evaluation of its bearing on the result, in holding that Act 195's program for loans of instructional materials and equipment constitutes Act 195 in that respect "direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, [that] inescapably results in the direct and substantial advancement of religious activity . . . and thus constitutes an impermissible establishment of religion." *Ante,* at 366.

I recognize that the plurality was on the horns of a dilemma. The plurality notes that the total 1972–1973 appropriation under Act 195 was $16,660,000, of which $4,670,000 was appropriated to finance the textbook program. *Ante,* at 365 n. 15. The plurality notes further that "aid programs like Act 195 . . . are dependent on continuing annual appropriations . . . which generate increasing demands as costs and population grow . . . ," *ibid.,* and, indeed, that the total Act 195 appropriation was increased $900,000 to $17,560,000 for the 1973–1974 school year. Plainly then, as in *Nyquist,* the political-divisiveness factor applies "with peculiar force to the . . . statute now before us." But to comply with *Nyquist,* as is required, the plurality obviously must attach determinative weight to the factor as respects both the textbook loan and instructional materials and equipment loan provisions, since both are inextricably intertwined in Act 195.[2] For in light of the massive appropriations in-

[2] *Kurtzman* supports this conclusion:

"We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal

volved, the plurality would be hard put to explain how the factor weighs determinatively against the validity of the instructional materials loan provisions, and not also against the validity of the textbook loan provisions. The plurality therefore would extricate itself from the horns of the dilemma by simply ignoring the factor in the weighing process.

But however much this evasion may be tolerable in the case of the instructional materials loan provisions, since these are invalidated on other grounds, responsibility for evaluating the weight to be accorded the factor cannot be evaded, in the case of the textbook loan provisions, by relying, as the plurality does, upon its agreement with the District Court that the textbook loan program is indistinguishable from the New York textbook loan program upheld in *Board of Education* v. *Allen*, 392 U. S. 236 (1968). For *Allen*, which I joined, was decided before *Kurtzman* ordained that the political-divisiveness factor must be involved in the weighing process, and understandably neither the parties to *Allen* nor the Court addressed that factor in that case. But whether or not *Allen* can withstand overruling in light of *Kurtzman* and *Nyquist*, which I question, it is clear that *Kurtzman*—which, I repeat, applied the factor to a Pennsylvania program that included reimbursement for the cost of textbooks—requires that the plurality weigh the factor in the instant case. Further, giving the factor the weight that *Kurtzman* and *Nyquist* require, compels, in my view

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pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." 403 U. S. 602, 624 (1971).

the conclusion that the textbook loan program of Act 195, equally with the program for loan of instructional materials and equipment, violates the Establishment Clause. The plurality's answer is that a difference in result is justified because Act 195 distinguishes between recipients of the loans: textbooks are lent to students, while instructional material and equipment are lent directly to the schools. That answer will not withstand analysis.

First, it is pure fantasy to treat the textbook program as a loan to students. It is true that, like the New York statute in *Allen*, Act 195 in terms talks of loans by the State of acceptable secular textbooks directly to students attending nonpublic schools. But even the plurality acknowledges that "the administrative practice is to have student requests for the books filed initially with the nonpublic school and to have the school authorities prepare collective summaries of these requests which they forward to the appropriate public officials. . . ." *Ante*, at 361. Further, "the nonpublic schools are permitted to store on their premises the textbooks being lent to the students." *Ante*, at 361 n. 9. Even if these practices were also followed under the New York statute, the regulations implementing Act 195 make clear, as the record in *Allen* did not, that the nonpublic school in Pennsylvania is something more than a conduit between the State and pupil. The Commonwealth has promulgated "Guidelines for the Administration of Acts 194 and 195" to implement the statutes. These regulations, unlike those upheld in *Allen*, constitute a much more intrusive and detailed involvement of the State and its processes into the administration of nonpublic schools. The whole business is handled by the schools and public authorities, and neither parents nor students have a say. The guidelines make crystal clear that the nonpublic school, not its pupils, is the motivating force behind the textbook

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loan, and that virtually the entire loan transaction is to be, and is in fact, conducted between officials of the nonpublic school, on the one hand, and officers of the State, on the other.

For example, § 4.3 of the Guidelines requires that on or before March 1 of each year, an official of each nonpublic school submit to the Pennsylvania Department of Education a loan request for the desired textbooks. The requests must be submitted on standardized forms "distributed by the Department of Education . . . to each nonpublic school or the appropriate chief administrator." Section 4.6 of the Guidelines provides that the "[t]extbooks requested will be shipped directly to the appropriate nonpublic school." Thus, although in terms the form provided by the Commonwealth for parents of nonpublic school students states that the parents of these pupils request the loan of textbooks directly from the State, the form is not returnable to the State, but to the nonpublic school, which tabulates the requests and submits its total to the State. Then, after the submission by the nonpublic school is approved by the appropriate state official, the books are transported not to the children whose parents ostensibly made the request, but directly to the nonpublic school, where they are physically retained when not in use in the classroom.

Indeed, the Guidelines make no attempt to mask the true nature of the loan transaction. In explicit words § 4.10 describes the transaction: "Textbooks *loaned to the nonpublic schools:* (a) shall be maintained on an inventory by the nonpublic school." (Emphasis added.) Section 4.11 provides: "It is presumed that textbooks on *loan to nonpublic schools* after a period of time will be lost, missing, obsolete or worn out. This information should be communicated to the Department of Education. After a period of six years, textbooks shall be

declared unserviceable and the disposal of such shall be at the discretion of the Secretary of Education." (Emphasis added.) Thus, the loan of the textbooks is treated by the regulations as what it in fact is: a loan from the State directly to the nonpublic school. Finally, § 4.12 completely removes any possible doubt. It provides:

> "The nonpublic school or the agency which it is a member shall be responsible for maintaining on file certificates of requests from parents of children for all textbook materials loaned to them under this act. The file must be open to inspection by the appropriate authority. A letter certifying the certificates on file shall accompany all loan requests."

Plainly, then, whatever may have been the case under the New York statute sustained in *Allen*, the loan ostensibly to students is, under Act 195, a loan in fact to the schools. In this regard, it should be observed that sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones. *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939).

Second, in any event, *Allen* itself made clear that, far from providing a *per se* immunity from examination of the substance of the State's program, even if the fact were, and it is not, that textbooks are loaned to the children rather than to the schools, that is only one among the factors to be weighed in determining the compatibility of the program with the Establishment Clause. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 781. And, clearly, in the context of application of the factor of political divisiveness, it is wholly irrelevant whether the loan is to the children or to the school. A divisive political potential exists because aid programs, like Act 195, are dependent on continuing

annual appropriations, and Act 195's textbook loan program, even if we accepted it as a form of loans to students, involves increasingly massive sums now approaching $5,000,000 annually.[3] It would blind reality to treat massive aid to nonpublic schools, under the guise of loans to the students, as not creating "a serious potential for divisive conflict over the issue of aid to religion." *Ante,* at 372.[4] The focus of the textbook loan program in terms of massive financial support for religious schools that creates the potential divisiveness is no less real than it is in the case of Act 195's instructional materials provisions and Act 194's invalidated program for auxiliary services. Act 195 is intended solely as a financial aid program to relieve the desperate financial plight of nonpublic, primarily parochial, schools. The plurality suggests that it is immaterial that Act 195 has that cast, in contrast with New York's statute in *Allen* which authorized loans to students attending both public and nonpublic schools. *Ante,* at 360 n. 8. On the contrary, Act 195's limitation of its financial support to aid to nonpublic school children exacerbates the potential for political divisive-

[3] I concede that I failed to apprehend the significance of the political-divisiveness factor in writing my separate opinion in *Kurtzman,* 403 U. S., at 642–661.

[4] The Court stated in *Nyquist,* 413 U. S., at 797 n. 56:

"The self-perpetuating tendencies of any form of government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In *Schempp,* the Court emphasized that it was 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment,' for what today is a 'trickling stream' may be a torrent tomorrow. 374 U. S., at 225. See also *Lemon* v. *Kurtzman,* 403 U. S., at 624–625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson,* it is not alone the potential expandability of state tax aid that renders such aid invalid. Not even 'three pence' could be assessed: 'Not the amount but "the principle of assessment was wrong."' 330 U. S., at 40–41 (quoting from Madison's Memorial and Remonstrance)."

ness.[5] "In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration." *Committee for Public Education & Religious Liberty* v. *Nyquist, supra,* at 797.

Finally, the textbook loan provisions of Act 195, even if ostensibly limiting loans to nonpublic school children, violate the Establishment Clause for reasons independent of the political-divisiveness factor. As I have said, unlike the New York statute in *Allen* which extended assistance to all students, whether attending public or nonpublic schools, Act 195 extends textbook assistance only to a special class of students, children who attend nonpublic schools which are, as the plurality notes, primarily religiously oriented. The Act in that respect contains the same fatal defect as the New Jersey statute held violative of the Establishment Clause in *Public Funds for Public Schools* v. *Marburger,* 358 F. Supp. 29 (NJ 1973), aff'd, 417 U. S. 961 (1974). The statute there involved was N. J. Stat. Ann. § 18A:58–63 which furnished state aid, in amounts up to $10 for elementary school students and up to $20 for high school students, to the parents of nonpublic school students as reimbursement for the cost of

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[5] Paraphrasing the Court's observation in *Nyquist, supra,* at 783: "There has been no endeavor 'to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former.' *Lemon* v. *Kurtzman, supra,* at 613. Indeed, it is precisely the function of [Act 195] to provide assistance to private schools, the great majority of which are sectarian. By [relieving parents of their textbook bill] the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."

"secular, nonideological textbooks, instructional materials and supplies." We affirmed the holding of the three-judge court that "because the language of [the statute] limits the assistance provided therein only to parents of children who attend nonpublic, predominately religiously-affiliated schools and not to parents of all school children, we are satisfied that its primary effect is to advance religion and that it is thereby unconstitutional." 358 F. Supp., at 36. *Marburger* thus establishes that the plurality's reliance today upon *Allen* is clearly misplaced.

Indeed, that reliance is also misplaced in light of its own holding today invalidating the provisions of Act 195 respecting the loan of instructional materials and equipment. I have no doubt that such materials and equipment are tools that substantially enhance the quality of the secular education provided by the religiously oriented schools. But surely the heart tools of that education are the textbooks that are prescribed for use and kept at the schools, albeit formally at the request of the students. Thus, what the Court says of the instructional materials and equipment, *ante*, at 365–366, may be said perhaps even more accurately of the textbooks:

> "But faced with the substantial amounts of direct support authorized by Act 195, it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion."

In sum, I join the Court's opinion as to Parts I, II, IV,

and V, except that I would go further in Part IV and rest the invalidation of the provisions of Act 195 for loans of instructional materials and equipment also upon the political-divisiveness factor. I dissent from Part III.

MR. CHIEF JUSTICE BURGER, concurring in the judgment in part and dissenting in part.

I agree with the Court only insofar as it affirms the judgment of the District Court. My limited agreement with the Court as to this action leads me, however, to agree generally with the views expressed by MR. JUSTICE REHNQUIST and MR. JUSTICE WHITE in regard to the other programs under review. I especially find it difficult to accept the Court's extravagant suggestion of potential entanglement which it finds in the "auxiliary services" program of Act 194. Here, the Court's holding, it seems to me, goes beyond any prior holdings of this Court and, indeed, conflicts with our holdings in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). There is absolutely no support in this record or, for that matter, in ordinary human experience for the concern some see with respect to the "dangers" lurking in extending common, nonsectarian tools of the education process—especially remedial tools—to students in private schools. As I noted in my separate opinion in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), the "fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law . . . is premised more on experience and history than on logic." *Id.*, at 802. Certainly, there is no basis in "experience and history" to conclude that a State's attempt to provide—through the services of its own state-selected professionals—the remedial assistance necessary for *all* its children poses the same potential for

unnecessary administrative entanglement or divisive political confrontation which concerned the Court in *Lemon* v. *Kurtzman, supra.* Indeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case. See, *e. g., ante,* at 371 n. 21.

If the consequence of the Court's holding operated only to penalize *institutions* with a religious affiliation, the result would be grievous enough; nothing in the Religion Clauses of the First Amendment permits governmental power to discriminate *against* or affirmatively stifle religions or religious activity. *Everson* v. *Board of Education,* 330 U. S. 1, 18 (1947). But this holding does more: it penalizes *children*—children who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parents' choice of religious exercise. This, as MR. JUSTICE REHNQUIST effectively demonstrates, totally turns its back on what MR. JUSTICE DOUGLAS wrote for the Court in *Zorach* v. *Clauson,* 343 U. S. 306, 313–314 (1952), particularly:

> "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-

sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads. As MR. JUSTICE DOUGLAS said for the Court in *Zorach, supra,* this is

> "to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Id.,* at 314.

The melancholy consequence of what the Court does today is to force the parent to choose between the "free exercise" of a religious belief by opting for a sectarian education for his child or to forgo the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance. One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion—at least while this Court sits.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, concurring in the judgment in part and dissenting in part.

Substantially for the reasons set forth in my opinion and those of THE CHIEF JUSTICE and MR. JUSTICE

WHITE in *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), and *Sloan* v. *Lemon*, 413 U. S. 825 (1973), I would affirm the judgment of the District Court.

Two Acts of the Pennsylvania Legislature are under attack in this case. Act 195 includes a program that provides for the loan of textbooks free of charge to elementary and secondary school students attending nonpublic schools, just as other provisions of Pennsylvania law provide similar benefits to children attending public schools, Pa. Stat. Ann., Tit. 24, § 8–801. I agree with MR. JUSTICE STEWART that this program is constitutionally indistinguishable from the New York textbook loan program upheld in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and on the authority of that case I join the judgment of the Court insofar as it upholds the textbook loan program.

The Court strikes down other provisions of Act 195 dealing with instructional materials and equipment[1] because it finds that they have "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act." *Ante*, at 363 (footnote omitted). This apparently follows from the high percentage of nonpublic schools that are "church-related or religiously affiliated educational institutions." *Ante*, at 364. The Court

[1] The District Court upheld these sections of Act 195 except insofar as they "permit[ted] the loan of instructional equipment which can be easily diverted to a religious use." 374 F. Supp. 639, 661 (ED Pa. 1974). The appellees have not sought review of this ruling. See *ante*, at 357–358, n. 7. My use of the term "instructional equipment" in this opinion is intended, therefore, to be coextensive with that portion of the program upheld by the District Court. See also 1972 Revisions to the Guidelines for the Administration of Acts 194 and 195, reproduced as Appendix A to Brief for Appellants.

thus again appears to follow "the unsupportable approach of measuring the 'effect' of a law by the percentage of" sectarian schools benefited. *Committee for Public Education & Religious Liberty* v. *Nyquist, supra,* at 804 (opinion of BURGER, C. J.). I find that approach to the "primary effect" branch of our three-pronged test no more satisfactory in the context of this instructional materials and equipment program than it was in the context of the tuition reimbursement and tax relief programs involved in *Nyquist, supra,* and *Sloan, supra.*

One need look no further than to the majority opinion for a demonstration of the arbitrariness of the percentage approach to primary effect. In determining the constitutionality of the textbook loan program established by Act 195, the plurality views the program in the context of the State's "well-established policy of lending textbooks free of charge to elementary and secondary school students." *Ante,* at 360 (footnote omitted). But when it comes time to consider the same Act's instructional materials and equipment program, which is not alleged to make available to private schools any materials and equipment that are not provided to public schools,[2] the majority strikes down this program because more than 75% of the nonpublic schools are church related or religiously affiliated.

If the number of sectarian schools were measured as a percentage of all schools, public and private, then no doubt the majority would conclude that the primary effect of the instructional materials and equipment program is not to advance religion.[3] One looks in vain,

[2] 374 F. Supp., at 644. Pa. Stat. Ann., Tit. 24, § 8–801. Instructional materials and equipment are defined in Act 195 largely in terms of materials and equipment that "are presently or hereafter provided for public school children of the Commonwealth." Act 195, § 1 (b).

[3] In 1972, "[a]pproximately one quarter of all children in the

however, for an explanation of the majority's selection of the number of private schools as the denominator in its instructional materials and equipment calculations. The only apparent explanation might be that Act 195 applies only to private schools while different legislation, Pa. Stat. Ann., Tit. 24, § 8–801, provides equipment and materials to public schools. But surely this is not a satisfactory explanation, for the plurality tells us, in connection with its discussion of the textbook loan program, which is administered to the public schools through the same statutory provision that provides equipment and materials to the public schools, that "it is of no constitutional significance whether the general program is codified in one statute or two." *Ante,* at 360 n. 8. We are left then with no explanation for the arbitrary course chosen.

The failure of the majority to justify the differing approaches to textbooks and instructional materials and equipment in the above respect is symptomatic of its failure even to attempt to distinguish the Pennsylvania textbook loan program, which the plurality upholds, from the Pennsylvania instructional materials and equipment loan program, which the majority finds unconstitutional. One might expect that the distinction lies either in the nature of the tangible items being loaned or in the manner in which the programs are operated. But the majority concedes that "the material and equipment that are the subjects of the loan—maps, charts, and laboratory equipment, for example—are 'self-polic[ing], in that starting as secular, nonideo-

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Commonwealth, in compliance with the compulsory attendance provisions of this act, attend[ed] nonpublic schools." Act 195, § 1 (a). If it be assumed that the average number of students per sectarian school does not vary materially from the average number of students per nonsectarian school, then less than 19% of all students attend sectarian schools.

logical and neutral, they will not change in use.'" *Ante,* at 365, quoting 374 F. Supp. 639, 660 (ED Pa. 1974). Nor can the fact that the school is the bailee be regarded as constitutionally determinative. *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S., at 781. In the textbook loan program upheld in *Allen, supra,* the private schools were responsible for transmitting the book requests to the Board of Education and were permitted to store the loaned books on their premises. 392 U. S., at 244 n. 6. I fail to see how the instructional materials and equipment program can be distinguished in any significant respect. Under both programs "ownership remains, at least technically, in the State," *id.,* at 243. Once it is conceded that no danger of diversion exists, it is difficult to articulate any principled basis upon which to distinguish the two Act 195 programs.

The Court eschews its primary-effect analysis in striking down Act 194, *ante,* at 369, and relies instead upon the proposition that the Act "give[s] rise to a constitutionally intolerable degree of entanglement between church and state." *Ante,* at 370. Acknowledging that Act 194 authorizes state financing "of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum," *ante,* at 370, the Court nonetheless finds this case indistinguishable from *Lemon* v. *Kurtzman* and companion cases, 403 U. S. 602 (1971), in which salary supplement programs for core curriculum teachers were found unconstitutional. "[A] state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." *Ante,* at 371 (footnote omitted).

I find this portion of the Court's opinion deficient as

a matter of process and insupportable as a matter of law. The burden of proof ordinarily rests upon the plaintiff, but the Court's conclusion that the dangers presented by a state-subsidized guidance counselor are the same as those presented by a state-subsidized chemistry teacher is apparently no more than an *ex cathedra* pronouncement on the part of the Court, if one may use that term in a case such as this, since the District Court found the facts to be exactly the opposite—after consideration of stipulations of fact and an evidentiary hearing:

> "The Commonwealth, recognizing the logistical realities, provided for traveling therapists rather than traveling pupils. There is no evidence whatsoever that the presence of the therapists in the schools will involve them in the religious missions of the schools. . . . The notion that by setting foot inside a sectarian school a professional therapist or counselor will succumb to sectarianization of his or her professional work is not supported by any evidence." 374 F. Supp., at 657.

The propensity of the Court to disregard findings of fact by district courts in Establishment Clause cases, see also *Lemon* v. *Kurtzman*, 403 U. S., at 665–667 (opinion of WHITE, J.), is at variance with the established division of responsibilities between trial and appellate courts in the federal system, Fed. Rule Civ. Proc. 52 (a).

As a matter of constitutional law, the holding by the majority that this case is controlled by *Lemon* v. *Kurtzman*, *supra*, and companion cases marks a significant *sub silentio* extension of that 1971 decision. In those cases the Court struck down the Rhode Island salary supplement program, under which teachers employed by nonpublic schools could qualify for additional salary payments from the State in order to bring their salaries

more closely in line with the prevailing scale in public schools, and a Pennsylvania program authorizing direct reimbursement to nonpublic schools; in order to qualify, the teachers could teach only subjects that were offered in the public schools. The premise supporting the Court's conclusion that these programs "involve[d] excessive entanglement between government and religion," 403 U. S., at 614, is found at 617:

> "We cannot ignore the danger that a teacher *under religious control and discipline* poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation." (Emphasis added.)

See also *id.*, at 618. The auxiliary services program established by Act 194 differs from the programs struck down in *Lemon* in two important respects. First the opportunities for religious instruction through the auxiliary services program are greatly reduced because of the considerably more limited reach of the Act. Unlike the core curriculum instruction provided in the *Lemon* programs, "auxiliary services" are defined in Act 194 to embrace a narrower range of services:

> "'Auxiliary services' means guidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, teaching English as a second language), and such other secular, neutral, nonideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Act 194, § 1 (b).

Even if the distinction between these services and core curricula is thought to be a matter of degree, the sec-

ond distinction between the programs involved in *Lemon* and Act 194 is a difference in kind. Act 194 provides that these auxiliary services shall be provided by personnel of the *public* school system.[4] Since the danger of entanglement articulated in *Lemon* flowed from the susceptibility of parochial school teachers to "religious control and discipline," I would have assumed that exorcisation of that constitutional "evil" would lead to a different constitutional result. The Court does not contend that the public school employees who would administer the auxiliary services are subject to "religious control and discipline." In fact the Court concedes that "auxiliary services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority." *Ante,* at 371. The decision of the Court that Act 194 is unconstitutional rests ultimately upon the unsubstantiated factual proposition that "[t]he potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present." *Ante,* at 372. "The test [of entanglement] is inescapably one of degree," *Walz* v. *Tax Comm'n,* 397 U. S. 664, 674 (1970), but if the Court is free to ignore the record, then appellees are left to wonder, with good reason, whether the possibility of meeting the entanglement test is now anything more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California,* 314 U. S. 160, 186 (1941) (Jackson, J., concurring).

I remain convinced of the correctness of MR. JUSTICE

[4] Act 194, § 1 (c) states that auxiliary services shall be provided by "each intermediate unit." The intermediate unit is a local administrative agency which oversees and assists school districts within a particular geographic area. See Pa. Stat. Ann., Tit. 24, §§ 9-951 to 9-971 (Supp. 1974-1975).

WHITE's statement in his dissenting opinion in *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S., at 814–815:

> "Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training."

I am disturbed as much by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment or in the cases interpreting it requires such an extreme approach to this difficult question, and "[a]ny interpretation of [the Establishment Clause] and the constitutional values it serves must also take account of the free exercise clause and the values it serves." P. Kauper, Religion and the Constitution 79 (1964). As MR. JUSTICE DOUGLAS wrote for the Court in *Zorach* v. *Clauson,* 343 U. S. 306, 313–314 (1952):

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and

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> the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

Except insofar as the Court upholds the textbook loan program, I respectfully dissent.

UNITED STATES *v.* RELIABLE TRANSFER CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74-363. Argued March 19, 1975—Decided May 19, 1975

The admiralty rule of divided damages, whereby the property damage in a maritime collision or stranding is equally divided whenever two or more parties involved are found to be guilty of contributory fault, regardless of the relative degree of their fault, *held* replaced by a rule requiring liability for such damage to be allocated among the parties proportionately to the comparative degree of their fault, and to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. Pp. 401–411.

497 F. 2d 1036, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court.

John P. Rupp argued the cause for the United States *pro hac vice*. With him on the brief were *Solicitor General Bork*, *Assistant Attorney General Hills*, *William Kanter*, and *Richard A. Olderman*.

Copal Mintz argued the cause for respondent. With him on the brief was *Herbert B. Halberg*.

MR. JUSTICE STEWART delivered the opinion of the Court.

More than a century ago, in *The Schooner Catharine* v. *Dickinson*, 17 How. 170, this Court established in our admiralty law the rule of divided damages. That rule, most commonly applied in cases of collision between two vessels, requires the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their fault may have been. The courts of every major maritime

nation except ours have long since abandoned that rule, and now assess damages in such cases on the basis of proportionate fault when such an allocation can reasonably be made. In the present case we are called upon to decide whether this country's admiralty rule of divided damages should be replaced by a rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party.

I

On a clear but windy December night in 1968, the *Mary A. Whalen,* a coastal tanker owned by the respondent Reliable Transfer Co., embarked from Constable Hook, N. J., for Island Park, N. Y., with a load of fuel oil. The voyage ended, instead, with the vessel stranded on a sand bar off Rockaway Point outside New York Harbor.

The *Whalen*'s course led across the mouth of Rockaway Inlet, a narrow body of water that lies between a breakwater to the southeast and the shoreline of Coney Island to the northwest. The breakwater is ordinarily marked at its southernmost point by a flashing light maintained by the Coast Guard. As, however, the *Whalen*'s captain and a deckhand observed while the vessel was proceeding southwardly across the inlet, the light was not operating that night. As the *Whalen* approached Rockaway Point about half an hour later, her captain attempted to pass a tug with a barge in tow ahead, but, after determining that he could not overtake them, decided to make a 180° turn to pass astern of the barge. At this time the tide was at flood, and the waves, whipped by northwest winds of gale force, were eight to ten feet high. After making the 180° turn and passing astern of the barge, the captain headed the *Whalen* eastwardly, believing that the vessel was then

south of the breakwater and that he was heading her for the open sea. He was wrong. About a minute later the light structure on the southern point of the breakwater came into view. Turning to avoid rocks visible ahead, the *Whalen* ran aground in the sand.

The respondent brought this action against the United States in Federal District Court, under the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. § 741 *et seq.*, and the Federal Tort Claims Act, 28 U. S. C. § 1346 *et seq.*, seeking to recover for damages to the *Whalen* caused by the stranding. The District Court found that the vessel's grounding was caused 25% by the failure of the Coast Guard to maintain the breakwater light and 75% by the fault of the *Whalen*. In so finding on the issue of comparative fault, the court stated:

> "The fault of the vessel was more egregious than the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow space between the bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. Obviously, he would not have found the breakwater light looming directly ahead of him within a minute after his change of course, if he had not been north of the point where he believed he was.
>
> "Equipped with look-out, chart, searchlight, radiotelephone, and radar, he made use of nothing except his own guesswork judgment. After . . . turning in a loop toward the north so as to pass astern of the tow, he should have made sure of his position before setting his new 73° course. The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. . . ."

The court held, however, that the settled admiralty rule of divided damages required each party to bear one-half of the damages to the vessel.[1]

The Court of Appeals for the Second Circuit affirmed this judgment. 497 F. 2d 1036. It held that the trial court "was not clearly erroneous in finding that the negligence of both parties, in the proportions stated, caused the stranding." *Id.*, at 1037–1038. And, although "mindful of the criticism of the equal division of damages rule and . . . recogniz[ing] the force of the argument

[1] The operation of the rule was described in *The Sapphire*, 18 Wall. 51, 56:

"It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. . . . If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault."

Similarly, in *The North Star*, 106 U. S. 17, 22, the rule was thus stated:

"[A]ccording to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden."

See also, *e. g.*, *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U. S. 341; *The Eugene F. Moran*, 212 U. S. 466.

It has long been settled that the divided damages rule applies not only in cases of collision between two vessels, but also in cases like this one where a vessel partly at fault is damaged in collision or grounding because of the mutual contributing fault of a nonvessel party. *Atlee* v. *Packet Co.*, 21 Wall. 389 (barge struck pier because of mutual fault of barge and of pier owner); *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, *supra* (steamship ran aground in canal because of joint negligence of steamship and canal company). See also G. Gilmore & C. Black, The Law of Admiralty § 7–17, pp. 522–523 (2d ed. 1975).

that in this type of case division of damages in proportion to the degree of fault may be more equitable," *id.*, at 1038, the appellate court felt constrained to adhere to the established rule and "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress." *Ibid.*

We granted certiorari, 419 U. S. 1018, to consider the continued validity of the divided damages rule.[2]

II

The precise origins of the divided damages rule are shrouded in the mists of history.[3] In any event it was

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[2] The Government's petition for certiorari presented the single question whether the admiralty rule of equally divided damages should be replaced by the rule of damages in proportion to fault. The respondent did not file a cross-petition for certiorari, but it now argues that the Government was solely at fault and requests an increase of the judgment in its favor to the full amount of its damages. However, absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to enlarge its rights thereunder. *Morley Constr. Co.* v. *Maryland Casualty Co.*, 300 U. S. 185, 190; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435. Moreover, even if it could be argued that respondent's challenge of the factual findings could be taken as an argument in support of the judgment, see Stern, When to Cross-Appeal or Cross-Petition—Certainty or Confusion?, 87 Harv. L. Rev. 763, 774 (1974), the findings of fact with respect to comparative negligence were concurred in by both the District Court and the Court of Appeals, and the respondent could not in this case meet its heavy burden under the "two-court rule." *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. See *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635.

[3] Most commentators have traced the rule back to Article XIV of the Laws of Oleron, promulgated about A. D. 1150, which provided that in cases of collision between a ship under way and another at anchor, the damages would be divided equally between the owners of the two vessels, so long as the captain and crew of the ship under way swore under oath that the collision was acci-

not until early in the 19th century that the divided damages rule as we know it emerged clearly in British admiralty law. In 1815, in *The Woodrop-Sims,* 2 Dods. 83, 165 Eng. Rep. 1422, Sir William Scott, later Lord Stowell, considered the various circumstances under which maritime collisions could occur and stated that division of damages was appropriate in those cases "where both parties are to blame." *Id.*, at 85, 165 Eng. Rep., at 1423. In such cases the total damages were to be "apportioned between" the parties "as having been occasioned by the fault of both of them." *Ibid.* Nine years later the divided damages rule became settled in English admiralty law when the House of Lords in a maritime collision case where both ships were at fault reversed a decision of a Scottish court that had apportioned damages by degree of blame, and, relying on *The Woodrop-Sims,* ordered that the damages be divided equally. *Hay* v. *Le Neve,* 2 Shaw H. L. 395.

It was against this background that in 1855 this Court adopted the rule of equal division of damages in *The Schooner Catharine* v. *Dickinson,* 17 How. 170. The rule was adopted because it was then the prevailing rule in England, because it had become the majority rule in the lower federal courts, and because it seemed the "most just and equitable, and . . . best [tended] to in-

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dental. See, *e. g.*, 4 R. Marsden, British Shipping Laws, Collisions at Sea § 119 (11th ed. 1961). See also Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304 (1957).

Other maritime nations enacted provisions similar to Article XIV during the same period, with slight variations in the scope of the rule and the principle of division. Marsden, *supra,* §§ 119–125. "The principle . . . underlying the rule seems to have been that collision was a peril of the sea—a common misfortune to be borne by all parties, either equally or rateably according to their interests at risk." *Id.*, § 140.

duce care and vigilance on both sides, in the navigation." *Id.*, at 177–178. There can be no question that subsequent history and experience have conspicuously eroded the rule's foundations.[4]

It was true at the time of *The Catharine* that the divided damages rule was well entrenched in English law. The rule was an ancient form of rough justice, a means of apportioning damages where it was difficult to measure which party was more at fault. See 4 R. Marsden, British Shipping Laws, Collisions at Sea §§ 119–147 (11th ed. 1961); Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304, 305–310 (1957). But England has long since abandoned the rule [5] and now follows the Brussels Collision Liability Convention of 1910 that provides for the apportionment of damages on the basis of "degree" of fault whenever it is possible to do so.[6] Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of pro-

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[4] The Court has acknowledged the continued existence of the divided damages rule in at least two recent cases. See *Weyerhaeuser S. S. Co.* v. *United States*, 372 U. S. 597, 603; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 284. But in neither case did the Court have occasion to re-examine the rule or to appraise the validity of its underpinnings or the propriety of its present application. The Court granted certiorari in *Union Oil Co.* v. *The San Jacinto*, 409 U. S. 140, to reconsider the divided damages rule, but did not reach the issue because of our conclusion that one of the vessels involved in that case was totally free of contributing fault.

[5] Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, § 1.

[6] Article 4 of the Convention provides in part: "If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

portional fault [7]—a fact that encourages transoceanic forum shopping. See G. Gilmore & C. Black, The Law of Admiralty 529 (2d ed. 1975) (hereinafter Gilmore & Black).

While the lower federal courts originally adhered to the divided damages rule, they have more recently followed it only grudgingly, terming it "unfair," [8] "illogical," [9] "arbitrary," "archaic and frequently unjust." [10] Judge Learned Hand was a particularly stern critic of the rule. Dissenting in *National Bulk Carriers* v. *United States*, 183 F. 2d 405, 410 (CA2), he wrote: "An equal division [of damages] in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations." And Judge Hand had all but invited this Court to overturn the rule when,

[7] We are informed by the Government that among the jurisdictions that have ratified or adhere to the Brussels Convention on Collision Liability are: Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Egypt, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Poland, Portugal, Romania, Sweden, Switzerland, Turkey, U. S. S. R., Uruguay, and Yugoslavia. See 6 A. Knauth & C. Knauth, Benedict on Admiralty 38–39 (7th ed. 1969). See also J. Griffin, The American Law of Collision 857 (1949); Staring, *supra*, n. 3, at 340–341; *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F. 2d 485, 488 (CA3).

[8] *Ahlgren* v. *Red Star Towing & Transp. Co.*, 214 F. 2d 618, 620 (CA2).

[9] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, 321 (CA2).

[10] *Tank Barge Hygrade* v. *The Gatco New Jersey*, *supra*, at 488. See also *Mystic S. S. Corp.* v. *M/S Antonio Ferraz*, 498 F. 2d 538, 539 n. 1 (CA2); *Petition of Oskar Tiedemann & Co.*, 289 F. 2d 237, 241–242 (CA3); *In re Adams' Petition*, 237 F. 2d 884, 887 (CA2); *Luckenbach S. S. Co.* v. *United States*, 157 F. 2d 250, 252 (CA2).

in an earlier opinion for the Court of Appeals for the Second Circuit, he stated that "we have no power to divest ourselves of this vestigial relic; we can only go so far as to close our eyes to doubtful delinquencies." *Oriental Trading & Transport Co.* v. *Gulf Oil Corp.*, 173 F. 2d 108, 111. Some courts, even bolder, have simply ignored the rule. See J. Griffin, The American Law of Collision 564 (1949); Staring, *supra*, at 341–342. Cf. *The Margaret*, 30 F. 2d 923 (CA3).

It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice.[11] An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. For example, where one ship's fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second. "This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence . . . ." Gilmore & Black 528.

And the potential unfairness of the division is magnified by the application of the rule of *The Pennsyl-*

[11] It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.

vania, 19 Wall. 125, whereby a ship's relatively minor statutory violation will require her to bear half the collision damage unless she can satisfy the heavy burden of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not have been.*" *Id.*, at 136 (emphasis added). See *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S. S. Corp.*, 259 F. 2d 11, 22 (CA5); *The New York Marine No. 10*, 109 F. 2d 564, 566 (CA2). See also Griffin, *supra*, § 202.

The Court has long implicitly recognized the patent harshness of an equal division of damages in the face of disparate blame by applying the "major-minor" fault doctrine to find a grossly negligent party solely at fault.[12] But this escape valve, in addition to being inherently unreliable, simply replaces one unfairness with another. That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all. See *Tank Barge Hygrade* v. *The Gatco New Jersey*, 250 F. 2d 485, 488 (CA3). The problem remains where it began—with the divided damages rule:

> "[T]he doctrine that a court should not look too jealously at the navigation of one vessel, when the faults of the other are glaring, is in the nature of a

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[12] See, *e. g.*, *The City of New York*, 147 U. S. 72, 85:

"Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor."

See also *The Victory & The Plymothian*, 168 U. S. 410; *The Umbria*, 166 U. S. 404; *The Oregon*, 158 U. S. 186; *The Ludvig Holberg*, 157 U. S. 60.

> sop to Cerberus. It is no doubt better than nothing; but it is inadequate to reach the heart of the matter, and constitutes a constant temptation to courts to avoid a decision on the merits." *National Bulk Carriers* v. *United States,* 183 F. 2d 405, 410 (CA2) (L. Hand, J., dissenting).

The divided damages rule has been said to be justified by the difficulty of determining comparative degrees of negligence when both parties are concededly guilty of contributing fault. *The Max Morris,* 137 U. S. 1, 12. Although there is some force in this argument, it cannot justify an equal division of damages in every case of collision based on mutual fault. When it is impossible fairly to allocate degrees of fault, the division of damages equally between wrongdoing parties is an equitable solution. But the rule is unnecessarily crude and inequitable in a case like this one where an allocation of disparate proportional fault has been made. Potential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases. Every other major maritime nation has evidently been able to apply a rule of comparative negligence without serious problems, see Mole & Wilson, A Study of Comparative Negligence, 17 Corn. L. Q. 333, 346 (1932); *In re Adams' Petition,* 125 F. Supp. 110, 114 (SDNY), aff'd, 237 F. 2d 884 (CA2), and in our own admiralty law a rule of comparative negligence has long been applied with no untoward difficulties in personal injury actions. See, *e. g., Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406, 409. See also Merchant Marine (Jones) Act, 38 Stat. 1185, as amended, 41 Stat. 1007, 46 U. S. C. § 688; Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. § 766.

The argument has also been made that the divided damages rule promotes out-of-court settlements, because when it becomes apparent that both vessels are at fault,

both parties can readily agree to divide the damages—thus avoiding the expense and delay of prolonged litigation and the concomitant burden on the courts. It would be far more difficult, it is argued, for the parties to agree on who was more at fault and to apportion damages accordingly. But the argument is hardly persuasive. For if the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that the major-minor fault rule may eventually persuade a court to absolve it of all liability. And if, on the other hand, it appears after a realistic assessment of the situation that the fault of both parties is roughly equal, then there is no reason why a rule that apportions damages would be any less likely to induce a settlement than a rule that always divides damages equally. Experience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements.[13] But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

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[13] The rule of comparative negligence applicable to personal injury actions in our maritime law, see the Jones Act, 46 U. S. C. § 688; Death on the High Seas Act, 46 U. S. C. § 766, does not appear to discourage the negotiation of settlements in such litigation. It has been reported, for example, that of the marine personal injury cases involving a federal question that were terminated in fiscal year 1974, only 9.6% ever reached trial. 1974 Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts, Table C4, p. 416.

Finally, the respondent suggests that the creation of a new rule of damages in maritime collision cases is a task for Congress and not for this Court.[14] But the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald* v. *United States Lines Co.*, 374 U. S. 16, 20. See also *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 n. 17; *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630–632. No statutory or judicial precept precludes a change in the rule of divided damages, and indeed a proportional fault rule would simply bring recovery for property damage in maritime collision cases into line with the rule of admiralty law long since established by Congress for personal injury cases. See the Jones Act, 46 U. S. C. § 688.[15]

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[14] The respondent also relies on the fact that the Senate has twice failed to ratify the Brussels Convention with its proportional fault rule. It is urged that this inaction indicates "grave doubt" in Congress that rejection of the divided damages rule will further justice. But even if we could find guidance in such "negative legislation," *Moragne* v. *States Marine Lines*, 398 U. S. 375, 405 n. 17, it appears that the Senate took no action with respect to the Convention, not because of opposition to a proportional fault rule, but because of the Convention's poor translation and the opposition of cargo interests to the provision which would prevent cargo from recovering in full from the noncarrying vessel by eliminating joint and several liability of vessels for cargo damage. See H. Baer, Admiralty Law of the Supreme Court 414–415 (2d ed. 1969); Staring, *supra*, n. 3, at 343. See also Comment, 64 Yale L. J. 878 (1955).

[15] This Court, in other appropriate contexts, has not hesitated to overrule an earlier decision and settle a matter of continuing concern, even though relief might have been obtained by legislation. See *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 n. 1 (Brandeis, J., dissenting) (collecting cases).

As the authors of a leading admiralty law treatise have put the matter:

> "[T]here is no reason why the Supreme Court cannot at this late date 'confess error' and adopt the proportional fault doctrine without Congressional action. The resolution to follow the divided damages rule, taken 120 years ago, rested not on overwhelming authority but on judgments of fact and of fairness which may have been tenable then but are hardly so today. No 'vested rights,' in theory or fact, have intervened. The regard for 'settled expectation' which is the heart-reason of . . . *stare decisis* . . . can have no relevance in respect to such a rule; the concept of 'settled expectation' would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision. The abrogation of the rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory." Gilmore & Black 531 (footnote omitted).[16]

The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have cor-

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[16] See also Donovan & Ray, Mutual Fault—Half-Damage Rule—A Critical Analysis, 41 Ins. Coun. J. 395 (1974); Allbritton, Division of Damages in Admiralty—A Rising Tide of Confusion, 2 J. of Maritime Law and Commerce 323 (1971); Jackson, The Archaic Rule of Dividing Damages in Marine Collisions, 19 Ala. L. Rev. 263 (1967); Staring, *supra*, n. 3, at 304; Mole & Wilson, A Study of Comparative Negligence, 17 Corn. L. Q. 333 (1932); and Huger, The Proportional Damage Rule in Collisions at Sea, 13 Corn. L. Q. 531 (1928).

rectly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve in *The Schooner Catharine*—the "just and equitable" allocation of damages. And worldwide experience has taught that that goal can be more nearly realized by a standard that allocates liability for damages according to comparative fault whenever possible.

We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.

Accordingly, the judgment before us is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SECURITIES INVESTOR PROTECTION CORP. *v.* BARBOUR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–2055. Argued March 17–18, 1975—Decided May 19, 1975

Petitioner Securities Investor Protection Corp. (SIPC) was established by Congress under the Securities Investor Protection Act of 1970 (SIPA) as a nonprofit membership corporation, to provide, *inter alia*, financial relief to the customers of failing broker-dealers with whom the customers had left cash or securities on deposit. The SIPA creates procedures for the orderly liquidation of financially troubled member firms under which the SIPC is required by assessing members to maintain a fund for customer protection. The SIPC may file an application with a court for a decree initiating liquidation proceedings if it determines that a member has failed or is in danger of failing to meet its obligations to customers and that any one of five specified conditions indicating financial difficulty exist, and the filing of the application vests the court with exclusive jurisdiction over the member and its property. If the court finds the existence of a specified condition, it must grant the application, issue the decree, and appoint the SIPC's designee as trustee to liquidate the business, and the SIPC is obligated, if necessary, to advance funds to meet certain customer claims. The Securities and Exchange Commission (SEC) is given "plenary authority" to supervise the SIPC and is specifically authorized to apply to a district court for an order requiring the SIPC to discharge its statutory obligations. This action was brought by respondent receiver appointed to wind up the affairs of Guaranty Bond, an insolvent registered broker-dealer, to compel the SIPC to exercise its statutory authority for the benefit of Guaranty Bond's customers. The District Court denied relief. The Court of Appeals reversed. *Held:* Customers of failing broker-dealers have no implied right of action under the SIPA to compel the SIPC to act for their benefit, the SEC's statutory authority to compel the SIPC to discharge its obligations being the exclusive means by which the SIPC can be forced to act. Pp. 418–425.

(a) The express statutory provision for one form of proceeding ordinarily implies that no other enforcement means was intended

by the legislature, and here the SIPA's legislative history was entirely consonant with the implication of the statutory language that no private right of action was intended. Cf. *Passenger Corp.* v. *Passengers Assn.*, 414 U. S. 453. Pp. 418–420.

(b) The overall structure and purpose of the SIPC scheme are incompatible with an implied private right of action, which might well precipitate liquidations that the SIPC, which treats that approach as a last resort, might be able to avoid. Pp. 420–423.

(c) The SIPA contains no standards of conduct that a private action could implement. *J. I. Case Co.* v. *Borak*, 377 U. S. 426; *Allen* v. *State Board of Elections*, 393 U. S. 544, distinguished. Pp. 423–425.

496 F. 2d 145, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., dissented.

Wilfred R. Caron argued the cause for petitioner. With him on the briefs was *Theodore H. Focht.*

W. Ovid Collins, Jr., argued the cause and filed a brief for respondent Barbour. *Solicitor General Bork, William L. Patton, Lawrence E. Nerheim,* and *David Ferber* filed briefs for respondent Securities and Exchange Commission.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Securities Investor Protection Corp. (SIPC) was established by Congress as a nonprofit membership corporation for the purpose, *inter alia,* of providing financial relief to the customers of failing broker-dealers with whom they had left cash or securities on deposit. The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 (Act or SIPA), 84 Stat. 1636, 15 U. S. C. § 78aaa *et seq.*,

to compel the SIPC to exercise its statutory authority for their benefit.

I

In December 1970 the Securities and Exchange Commission (SEC) filed a complaint in District Court against Guaranty Bond and Securities Corp., a registered broker-dealer, to enjoin continued violation of the Commission's net capital and other rules. On January 6, 1971, the District Court issued a preliminary injunction, and on January 29 it granted the Commission's motion for appointment of a receiver to wind up the affairs of Guaranty Bond. James C. Barbour (hereafter respondent) was appointed receiver.

On April 6, 1972, respondent, alleging that customers of Guaranty Bond would sustain a loss at least equal to the costs of administering the receivership, obtained from the court an order directing the SEC and SIPC to show cause "why the remedies afforded by the [SIPA] should not be made available in this proceeding." In its answer the SEC took the position that respondent had not demonstrated that Guaranty's customers would in fact sustain any loss since it appeared that the receiver would have a cause of action for damages or restitution against Guaranty's parent company and principals. The SIPC, on the other hand, challenged the receiver's standing to maintain an action to compel its intervention and, in direct opposition to the position of the SEC, argued that Guaranty's insolvency prior to the December 30, 1970, date on which the SIPA took effect meant that application of the Act to this case would give it an unlawful retroactive effect.

The District Court upheld the receiver's right of action, but denied relief on the ground that Guaranty's hopeless insolvency prior to the effective date of the SIPA rendered the Act inapplicable. The Court of Appeals for

the Sixth Circuit reversed. Since Guaranty had conducted 101 transactions after December 30, and the SEC did not move to prevent its carrying on business as a broker-dealer until January 6, it held that Guaranty qualified as a broker-dealer on the effective date of the Act. The court then rejected the SIPC's argument that the provision for SEC enforcement actions to compel the SIPC to perform its functions was meant to be exclusive of such actions by protected customers or their representative, and remanded the case for further proceedings. We granted certiorari, limited to the questions whether customers have an implied right of action to compel the SIPC to act and, if so, whether a receiver has standing to maintain it. 419 U. S. 894 (1974). Since we now reverse the Court of Appeals on the ground that no implied right of action exists, we do not address the second question.

II

Following a period of great expansion in the 1960's, the securities industry experienced a business contraction that led to the failure or instability of a significant number of brokerage firms. Customers of failed firms found their cash and securities on deposit either dissipated or tied up in lengthy bankruptcy proceedings. In addition to its disastrous effects on customer assets and investor confidence, this situation also threatened a "domino effect" involving otherwise solvent brokers that had substantial open transactions with firms that failed. Congress enacted the SIPA to arrest this process, restore investor confidence in the capital markets, and upgrade the financial responsibility requirements for registered brokers and dealers. S. Rep. No. 91–1218, pp. 2–4 (1970); H. R. Rep. No. 91–1613, pp. 2–4 (1970).

The Act apportions responsibility for these tasks among the SEC, the securities industry self-regulatory

organizations, and the SIPC, a nonprofit, private membership corporation to which most registered brokers and dealers are required to belong. 15 U. S. C. § 78ccc. Most important for present purposes, the Act creates a new form of liquidation proceeding, applicable only to member firms, designed to accomplish the completion of open transactions and the speedy return of most customer property.

To this end, the SIPC is required to establish and maintain a fund for customer protection by laying assessments on the annual gross revenues of its members. The SEC and the securities industry self-regulatory organizations are required to notify the SIPC whenever it appears that a member is in or approaching financial difficulty. If the SIPC determines that a member has failed or is in danger of failing to meet its obligations to customers, and finds any one of five specified conditions suggestive of financial irresponsibility, then it "may apply to any court of competent jurisdiction . . . for a decree adjudicating that customers of such member are in need of the protection provided by [the Act]." § 78eee (a)(2).

The mere filing of an SIPC application gives the court in which it is filed exclusive jurisdiction over the member and its property, wherever located, and requires the court to stay "any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the [member] or its property and any other suit against any receiver, conservator, or trustee of the [member] or its property." § 78eee (b)(2). If the SEC has pending any action against the member, it may, with the Commission's consent, be combined with the SIPC proceeding. If no such action is pending, the SEC may intervene as a party to the SIPC proceeding.

If the court finds any of the five conditions on which

an SIPC application may be based, it must grant the application and issue the decree, and appoint as trustee for the liquidation of the business and as attorney for the trustee, "such persons as SIPC shall specify." §§ 78eee (b)(1), (3).

The trustee is empowered and directed by the Act to return customer property, complete open transactions, enforce rights of subrogation, and liquidate the business of the member, § 78fff (a); he is not empowered to reorganize or rehabilitate the business. The SIPC is required to advance him such sums as are necessary to complete open transactions, and to accomplish the return of customer property up to a value of $50,000. § 78fff (f).

The role of the SEC in this scheme, insofar as relevant to the present case, is one of "plenary authority" to supervise the SIPC. S. Rep. No. 91–1218, *supra,* at 1; see H. R. Rep. No. 91–1613, *supra,* at 12. For example, it may disapprove in whole or in part any bylaw or rule adopted by the Board of Directors of the SIPC, or require the adoption of any rule it deems appropriate, in order to promote the public interest and the purposes of the Act. 15 U. S. C. § 78ccc (e). It may inspect and examine the SIPC's records and require that any information it deems appropriate be furnished to it, and it receives the corporation's annual report for inspection and transmission, with its comments, to the President and Congress. § 78ggg (c). It may participate in any liquidation proceeding initiated by the SIPC, but even more important, § 7 (b) of the Act, § 78ggg (b), provides:

> "Enforcement of actions.—In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, the Commission may apply to the district court of the United States in which the principal

> office of SIPC is located for an order requiring SIPC to discharge its obligations under [the Act] and for such other relief as the court may deem appropriate to carry out the purposes of [the Act]."

It is against this background relationship between the SIPC and the SEC that we must approach the question whether, in addition to the Commission, a member's customers or their representative may seek in district court to compel the SIPC "to commit its funds or otherwise to act for the protection" of such customers.

III

The respondent contends that since the SIPA does not in terms preclude a private cause of action at the instance of a member broker's customers, and since such customers are the intended beneficiaries of the Act, the Court should imply a right of action by which customers can compel the SIPC to discharge its obligations to them. As we said only last Term in analyzing a similar contention: "It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act." *Passenger Corp.* v. *Passengers Assn.*, 414 U. S. 453, 457–458 (1974) (hereinafter *Amtrak*).

In *Amtrak* itself the petitioner was a corporation created by Congress to assume from private railroads certain intercity rail passenger service responsibilities. The respondent passenger association brought an action to enjoin the discontinuance of a particular service as announced by the corporation pursuant to its authority under § 404 (b)(2) of the Rail Passenger Service Act of 1970 (Amtrak Act), 45 U. S. C. § 564 (b)(2). That Act made express provision for suits against Amtrak to enforce its duties and obligations only "upon petition of the

Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected" by the agreement. 45 U. S. C. § 547 (a). There, as here, the plaintiff-respondent argued that statutory authorization for one type of action against the congressionally created corporation did not preclude another at the instance of the intended beneficiaries of the law.

The Court's analysis of the claim in *Amtrak* began with the observation that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the Legislature. That implication would yield, however, to "clear contrary evidence of legislative intent," 414 U. S., at 458, for which we turned to the legislative history and the overall structure of the Amtrak Act.

Inspection revealed that the legislative history of the Amtrak Act was entirely consonant with the implication of the statutory language that no private right of action was intended.[1] The general structure and purpose of the Act gave further support to that conclusion. Congress had expected that, in creating an economically viable rail passenger system, some rail service would have to be discontinued by Amtrak; it had provided an efficient and expeditious means to that end, which seemed incompatible with an intent to allow a private action by any passenger affected by a discontinuance decision.[2]

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[1] Both the Secretary of Transportation, who was given primary responsibility for implementing the law, and spokesmen for organized labor had interpreted the bill as enacted to preclude private actions other than those specifically authorized. The drafting subcommittee to which these views had been expressed found nothing in them to correct.

[2] See 414 U. S., at 462:

"If, however, [the Act] were to be interpreted as permitting private lawsuits to prevent the discontinuance of passenger trains, then the

Nor would the absence of a private right of action leave Amtrak free to disregard the public interest in its decisionmaking. In addition to investing the Attorney General with "authority to police the Amtrak system and to enforce the various duties and obligations imposed by the Act" by court action, Congress provided for "substantial scrutiny" over Amtrak's operations by requiring it to make periodic reports to Congress and the President and to open its books to the Comptroller General for auditing. 414 U. S., at 464.

The similarities between the present case and *Amtrak* are undeniable and for the respondent, we think, insurmountable. As with Amtrak, so with the SIPC, Congress has created a corporate entity to solve a public problem; it has provided for substantial supervision of its operations by an agency charged with protection of the public interest—here the SEC—and for enforcement by that agency in court of the obligations imposed upon the corporation. The corporation is required to report to Congress and the President, and to open its books and records to the SEC and the Comptroller General. Further, Congress has chartered the SIPC, unlike Amtrak, as a nonprofit corporation, and it has put its direction in the hands of a publicly chosen board of directors.

Beyond the inference to be drawn from the structure of the SIPC, there is no extrinsic evidence that Congress intended to allow an action such as that before us.[3] As

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only effect of the Act in this regard would have been to substitute the federal district courts for the state or federal administrative bodies formerly required to pass upon proposed discontinuances."

[3] Respondent argues that because Congress provided that the SIPC can "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State, or Federal," 15 U. S. C. § 78ccc (b)(1), it must have contemplated occasions when an aggrieved customer of a member firm would be able to sue. In light of the specific terms of the more relevant section governing

the respondent concedes, there is no indication in the legislative history of the SIPA that Congress ever contemplated a private right of action parallel to that expressly given to the SEC. Additionally, as in *Amtrak*, it is clear that the overall structure and purpose of the SIPC scheme are incompatible with such an implied right.

Congress' primary purpose in enacting the SIPA and creating the SIPC was, of course, the protection of investors. It does not follow, however, that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose.

The SIPC properly treats an application for the appointment of a receiver and liquidation of a brokerage firm as a last resort. It maintains an early-warning system and monitors the affairs of any firm that it is given reason to believe may be in danger of failure. Its experience to date demonstrates that more often than not an endangered firm will avoid collapse by infusion of new capital or merger with a stronger firm.[4] Even fail-

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suits to compel the SIPC to act for the benefit of investors, that conclusion is unwarranted. It is also incompatible with the limitation of SEC actions "to the district court of the United States in which the principal office of SIPC is located." 15 U. S. C. § 78ggg (b). It would be anomalous for Congress to have centralized SEC suits for the apparent convenience of the SIPC while exposing the corporation to substantively identical suits by investors "in any court, State or Federal."

[4] Of the 266 firms brought to the attention of the SIPC by the exchanges, self-regulatory organizations, and the SEC between the effective date of the SIPA and the end of 1973, only 32 were subjected to SIPC liquidation as of December 31, 1973. Sixty-six withdrew from the business of carrying customer accounts, 26 self-liquidated, 20 became inactive without customer loss, 11 merged with other firms, 62 corrected their problems, and 49 remained under surveillance. SIPC 1973 Annual Report 17 (1974).

ing those alternatives, a firm may be able to liquidate under the supervision of one of the self-regulatory organizations, or the district court, without danger of loss to customers. The SIPC's policy, therefore, is to defer intervention "until there appear[s] to be no reasonable doubt that customers would need the protection of the Act." SIPC 1973 Annual Report 7 (1974). By this policy, the SIPC avoids unnecessarily engendering the costs of precipitate liquidations—the costs not only of administering the liquidation, but also of customer illiquidity and additional loss of confidence in the capital markets—without sacrifice of any customer protection that may ultimately prove necessary. A customer, by contrast, cannot be expected to consider, or have adequate information to consider, these public interests in timing his decision to apply to the courts.

The respondent in this case does not, of course, claim any right to make the decision that a firm should be liquidated; the Act makes that a judicial decision. He seeks only the right to ask the District Court to make that decision when both the SIPC and the SEC have refused or simply failed to do so. In practical effect, however, the difference is slight. Except with respect to the solidest of houses, the mere filing of an action predicated upon allegations of financial insecurity might often prove fatal.[5] Other customers could not be expected to leave

[5] See Freeman, Administrative Procedures, 22 Bus. Law. 891, 897 (1967): "The moment you bring a public proceeding against a broker-dealer who depends upon public confidence in his reputation, he is to all intents and purposes out of business." See sources collected at Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1, 33 n. 162 (1972), and Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1394–1397 (1973). There may, of course, be less reason for public reaction to a private, as opposed to an SEC, suit to compel the SIPC's protective measures, but there is little reason to think that the investing public, with its assets at risk, would be interested in the distinction.

their cash and securities on deposit, nor other brokers to initiate new transactions that the firm might not be able to cover when due if a receiver is appointed, nor would suppliers be likely to continue dealing with such a firm. These consequences are too grave, and when unnecessary, too inimical to the purposes of the Act, for the Court to impute to Congress an intent to grant to every member of the investing public control over their occurrence. On the contrary, they seem to be the very sorts of considerations that motivated Congress to put the SIPC in the hands of a public board of directors, responsible to an agency experienced in regulation of the securities markets.[6]

We need not pause long over the distinctions between this case and those, such as *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), and *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969), in which the Court held that an implied private cause of action was maintainable.

In *J. I. Case* a stockholder sought damages against his corporation for its alleged misrepresentations, violative of § 14 (a) of the Securities Exchange Act of 1934, in soliciting proxy votes for the approval of a merger. In light of the "broad remedial purposes" of the Act and the SEC's representation that private enforcement was necessary to effectuate those purposes, the Court held that the action for damages could be maintained.

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[6] The sequence of events giving rise to this case provided no opportunity for a run on Guaranty because the attempt to compel the SIPC's intervention occurred after the firm had ceased doing business and had come within the jurisdiction of the District Court for liquidation, at the instance of the SEC. In these limited circumstances Congress could reasonably have provided for a private action by a receiver against the SIPC, but it did not and we are not at liberty to do so. There is, after all, a real difference between a court's implying a right of action to effectuate the purposes of a statute and its cutting a code of procedure out of whole cloth.

The Court first concluded that it was "clear that private parties have a right under § 27 [of the Act] to bring suit for violation of § 14 (a)," since § 27 specifically granted the district courts jurisdiction over " 'all suits in equity and actions at law brought to enforce any liability or duty created' " under the Act. 377 U. S., at 430–431. The more difficult question was whether the private parties, once in court, could seek damages as well as equitable relief. On this point, the Court agreed with the SEC that private enforcement of the proxy rules was a necessary supplement to SEC enforcement. Since there was no contrary indication from Congress, the Court so held, relying on the statement from *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Unlike the Securities Exchange Act, the SIPA contains no standards of conduct that a private action could help to enforce, and it contains no general grant of jurisdiction to the district courts. As in *Amtrak*, a private right of action under the SIPA would be consistent neither with the legislative intent, nor with the effectuation of the purposes it is intended to serve.

The *Allen* case arose under the Voting Rights Act of 1965. The question there was whether a private citizen could sue to set aside a state or local election law on the ground of its repugnancy to the Act. The federal statute provided that the Attorney General may bring such suits, but was silent as to the rights of others. It was clear to the Court—and to the Attorney General—that the Act would be practically unenforceable against the many local governments subject to its strictures if only the Attorney General were authorized to sue. We thus found it "consistent with the broad purpose of the Act to allow

the individual citizen standing to insure that his city or county government complies with" its requirements. 393 U. S., at 557.

There is not the slightest reason to think that the SIPA, in contrast to the Voting Rights Act, imposes such burdens on the parties charged with its administration that Congress must either have intended their efforts to be supplemented by those of private investors or enacted a statute incapable of achieving its purpose. Instead of enlisting the aid of investors in achieving that purpose, Congress imposed upon the SEC, the exchanges, and the self-regulatory organizations the obligation to report to the SIPC any situation that might call for its intervention.

For these reasons we are unable to agree with the proposition that the customers of a member broker may sue to compel the SIPC to perform its statutory functions.[7] The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court with instructions that the receiver's petition for an order to show cause be dismissed.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.

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[7] The SEC suggests in its brief that a determination by it not to proceed against the SIPC with respect to a member broker-dealer whose customers have incurred a loss of the type against which the SIPA is directed might be reviewable under the Administrative Procedure Act for an abuse of discretion. We need express no opinion on that matter today.

ELLIS ET AL. *v.* DYSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–130. Argued November 12, 1974—Decided May 19, 1975

After being convicted and fined by the Municipal Court, on pleas of *nolo contendere*, for violating the Dallas loitering ordinance, petitioners, rather than seeking a trial *de novo* in County Court and thus subjecting themselves to the possibility of a larger fine, brought action in Federal District Court challenging the constitutionality of the ordinance and seeking declaratory and other relief. The District Court dismissed the action, holding that federal declaratory and injunctive relief against future state criminal prosecutions was not available absent allegations of bad-faith prosecution, harassment, or other unusual circumstances presenting a likelihood of irreparable injury to petitioners if the ordinance were enforced, a result felt to be mandated by the decision in *Becker* v. *Thompson*, 459 F. 2d 919 (CA5), wherein it was held that the principles of *Younger* v. *Harris*, 401 U. S. 37, applied not only where a state criminal prosecution was actually pending, but also where a prosecution was merely threatened. The Court of Appeals affirmed. *Held:* Since the *Becker* decision was subsequently reversed in *Steffel* v. *Thompson*, 415 U. S. 452, wherein it was held that federal declaratory relief is not precluded when a state prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending, even if a showing of bad-faith enforcement or other special circumstances has not been made, the Court of Appeals' judgment is reversed and the case is remanded to the District Court for reconsideration in light of *Steffel* as to whether there is a genuine threat of prosecution and as to the relationship between the past prosecution and the alleged threat of future prosecutions. Pp. 433–434.

475 F. 2d 1402, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and REHNQUIST, JJ., joined. REHNQUIST, J., filed a concurring opinion, *post*, p. 435. WHITE, J., filed an opinion concurring in part and dissenting in part, *post*, p. 437. POWELL, J., filed a dissenting opinion, in which STEWART, J., joined, and in Part II of which BURGER, C. J., joined, *post*, p. 437.

Burt Neuborne argued the cause for petitioners. With him on the brief were *Walter W. Steele, Jr., John E. Kennedy, Joel Gora,* and *Melvin L. Wulf.*

Douglas H. Conner argued the cause for respondents. With him on the brief was *N. Alex Bickley.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This action, instituted in the United States District Court for the Northern District of Texas, challenges the constitutionality of the loitering ordinance of the city of Dallas. We do not reach the merits, for the District Court dismissed the case under the compulsion of a procedural precedent of the United States Court of Appeals for the Fifth Circuit which we have since reversed.

I

Petitioners Tom E. Ellis and Robert D. Love, while in an automobile, were arrested in Dallas at 2 a. m. on January 18, 1972, and were charged with violating the city's loitering ordinance. That ordinance, § 31–60 of the 1960 Revised Code of Civil and Criminal Ordinances of the City of Dallas, Texas, as amended by Ordinance No. 12991, adopted July 20, 1970, provides:

> "It shall be unlawful for any person to loiter, as hereinafter defined, in, on or about any place, public or private, when such loitering is accompanied by activity or is under circumstances that afford probable cause for alarm or concern for the safety and well-being of persons or for the security of property, in the surrounding area."

The term "loiter" is defined to

> "include the following activities: The walking about aimlessly without apparent purpose; lingering; hanging around; lagging behind; the idle spending of

time; delaying; sauntering and moving slowly about, where such conduct is not due to physical defects or conditions."

A violation of the ordinance is classified as a misdemeanor and is punishable by a fine of not more than $200.

Before their trial in the Dallas Municipal Court [1] petitioners sought a writ of prohibition from the Texas Court of Criminal Appeals to preclude their prosecution on the ground that the ordinance was unconstitutional on its face. App. 29. The petitioners contended, in particular, that § 31–60 is vague and overbroad, that it "permits arrest on the basis of alarm or concern only," and that it allows the offense to be defined "upon the moment-by-moment opinions and suspicions of a police officer on patrol." App. 31. The Court of Criminal Appeals, however, denied the application without opinion on February 21, 1972.[2] The following day the Municipal Court proceeded to try the case. After overruling petitioners' motion to dismiss the charges on the grounds of the ordinance's unconstitutionality, the court accepted their pleas of *nolo contendere* [3] and fined each petitioner $10 plus $2.50 costs.

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[1] The Municipal Court was formerly known as the Corporation Court. The name was changed by Tex. Sess. Laws, 61st Leg., p. 1689, c. 547 (1969), now codified as Tex. Rev. Civ. Stat., Art. 1194A (Supp. 1974–1975).

[2] The denial may have been based on *State ex rel. Bergeron* v. *Travis County Court*, 76 Tex. Cr. R. 147, 153–154, 174 S. W. 365, 367–368 (1915), and *State ex rel. Burks* v. *Stovall*, 324 S. W. 2d 874, 877 (Tex. Ct. Crim. App. 1959), requiring that questions concerning the constitutionality of a local ordinance be raised in County Court before a writ of prohibition will issue from the Court of Criminal Appeals.

[3] The pertinent Texas statute provides:

"On the part of the defendant, the following are the only pleadings:

. . . . . .

"6. A plea of nolo contendere. The legal effect of such plea shall

Under Texas' two-tier criminal justice system, petitioners could not directly appeal the judgment of the Municipal Court, but were entitled to seek a trial *de novo* in the County Court,[4] Tex. Code Crim. Proc., Art. 44.17 (1966), by filing at least a $50 bond within the 10 days following the Municipal Court's judgment. Arts. 44.13 and 44.16. At the *de novo* trial petitioners would have been subject to the same maximum fine of $200. Appellate review of the County Court judgment would be available in the Texas Court of Criminal Appeals if the fine imposed exceeded $100. Art. 4.03.

Electing to avoid the possibility of the imposition of a larger fine by the County Court than was imposed by the Municipal Court, petitioners brought the present federal action [5] under the civil rights statutes, 42 U. S. C. § 1983 [6] and 28 U. S. C. §§ 1343 (3) and (4), and under the Declaratory Judgment Act, 28 U. S. C. §§ 2201–2202.

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be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Tex. Code Crim. Proc., Art. 27.02 (1966), as amended by Tex. Sess. Laws, 60th Leg., c. 659, § 17, p. 1738 (1967).

Since petitioners' convictions, the Article has been further amended but the new amendments are of no significance for this case. See Tex. Sess. Laws, 63d Leg., c. 399, § 2 (A), p. 969 (1973).

[4] We upheld a similar two-tier system in *Colten* v. *Kentucky*, 407 U. S. 104, 112–119 (1972).

[5] The federal action was instituted after the 10-day period for posting bond and filing for review *de novo* in the County Court had expired.

[6] "§ 1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Named as defendants, in both their individual and official capacities, were the then chief of police, the city attorney, the then city manager, the then clerk of the Municipal Courts, and the mayor. Petitioners sought a declaratory judgment that the loitering ordinance is unconstitutional. They complained that the statute is vague and overbroad, places too much discretion in arresting officers, proscribes conduct that may not constitutionally be limited, and impermissibly chills the rights of free speech, association, assembly, and movement. Petitioners also sought equitable relief in the form of expunction of their records of arrests and convictions for violating the ordinance, and of some counteraction to any distribution to other law enforcement agencies of information as to their arrests and convictions. No injunctive relief against any future application of the statute to them was requested. Cf. *Reed* v. *Giarrusso,* 462 F. 2d 706 (CA5 1972).

The petitioners moved for summary judgment upon the pleadings, admissions, affidavits, and "other matters of record." App. 42. The respondents, in turn, moved to dismiss and suggested, as well, "that the abstention doctrine is applicable." *Id.,* at 58. The District Court held that federal declaratory and injunctive relief against future state criminal prosecutions was not available where there was no allegation of bad-faith prosecution, harassment, or other unusual circumstances presenting a likelihood of irreparable injury and harm to the petitioners if the ordinance were enforced. This result, it concluded, was mandated by the decision of its controlling court in *Becker* v. *Thompson,* 459 F. 2d 919 (CA5 1972). In *Becker,* the Fifth Circuit had held that the principles of *Younger* v. *Harris,* 401 U. S. 37 (1971), applied not only where a state criminal prosecution was actually pending, but also where a state criminal prosecution was merely threatened. Since the present petitioners' complaint

contained insufficient allegation of irreparable harm, the case was dismissed. 358 F. Supp. 262 (1973).[7] The United States Court of Appeals for the Fifth Circuit affirmed without opinion. 475 F. 2d 1402 (1973). After we unanimously reversed the *Becker* decision on which the District Court had relied, *Steffel* v. *Thompson*, 415 U. S. 452 (1974), we granted the petition for certiorari. 416 U. S. 954 (1974).

II

In *Steffel* the Court considered the issue whether the *Younger* doctrine should apply to a case where state prosecution under a challenged ordinance was merely threatened but not pending. In that case, Steffel and his companion, Becker, engaged in protest handbilling at a shopping center. Police informed them that they would be arrested for violating the Georgia criminal trespass statute if they did not desist. Steffel ceased his handbilling activity, but his companion persisted in the endeavor and was arrested and charged.

Steffel then filed suit under 42 U. S. C. § 1983 and 28 U. S. C. § 1343 in Federal District Court, seeking a declaratory judgment [8] that the ordinance was being applied in violation of his rights under the First and Fourteenth Amendments. It was stipulated that if Steffel returned and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the statute. 415 U. S., at 456. Con-

[7] The District Court noted, too, that no showing of exhaustion of the state appellate process had been made. 358 F. Supp., at 265–266.

[8] Steffel initially also sought an injunction. After the District Court had denied both declaratory and injunctive relief, Steffel chose to appeal only the denial of declaratory relief. *Becker* v. *Thompson*, 459 F. 2d 919, 921 (CA5 1972); *Steffel* v. *Thompson*, 415 U. S. 452, 456 n. 6 (1974). We were not presented, therefore, with any dispute concerning the propriety of injunctive relief.

trary to the views of the District Court and of the Court of Appeals in the present case, we held that "federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied." *Id.*, at 475.

Thus, in *Steffel*, we rejected the argument that bad-faith prosecution, harassment, or other unique and extraordinary circumstances must be shown before federal declaratory relief may be invoked against a genuine threat of state prosecution. Unlike the situation where state prosecution is actually pending, cf. *Samuels* v. *Mackell*, 401 U. S. 66 (1971), where there is simply a threatened prosecution, considerations of equity, comity, and federalism have less vitality.[9] Instead, the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount. 415 U. S., at 462–463.

Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under § 1983 is free of that require-

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[9] The Court stated in *Steffel, id.*, at 462:

"When no state criminal proceeding is pending at the time the federal complaint is filed, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. In addition, while a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."

ment. 415 U. S., at 472–473. See, *e. g., Monroe* v. *Pape*, 365 U. S. 167, 183 (1961). We did require, however, that it be clearly demonstrated that there was a continuing, actual controversy, as is mandated both by the Declaratory Judgment Act, 28 U. S. C. § 2201, and by Art. III of the Constitution itself. Although we noted in *Steffel*, 415 U. S., at 459, that the threats of prosecution were not "imaginary or speculative," as those terms were used in *Younger*, 401 U. S., at 42, we remanded the case to the District Court to determine, among other things, if the controversy was still live and continuing. See 415 U. S., at 460. In particular, we observed that the handbilling had been directed against our Government's policy in Vietnam and "the recent developments reducing the Nation's involvement in that part of the world" could not be ignored, so that there was a possibility there no longer existed " 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment,' " *ibid.*, quoting *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

III

The principles and approach of *Steffel* are applicable here. The District Court and the Court of Appeals decided this case under the misapprehension that the *Younger* doctrine applied where there is a threatened state criminal prosecution as well as where there is a state criminal prosecution already pending. Those courts had no reason to reach the merits of the case or to determine the actual existence of a genuine threat of prosecution, or to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future. Now that *Steffel* has been decided, these issues may properly be investigated.

We therefore reverse the judgment of the Court of Appeals and remand the case to the District Court for reconsideration in the light of our opinion in *Steffel* v. *Thompson*, reversing *Becker* v. *Thompson*. It is appropriate to observe in passing, however, that we possess greater reservations here than we did in *Steffel* as to whether a case or controversy exists today. First, at oral argument counsel for petitioners acknowledged that they had not been in touch with their clients for approximately a year and were unaware of their clients' whereabouts. Tr. of Oral Arg. 5–7, 18–22, 25–26. Petitioners, apparently, are not even apprised of the progress of this litigation. Unless petitioners have been found by the time the District Court considers this case on remand, it is highly doubtful that a case or controversy could be held to exist; it is elemental that there must be parties before there is a case or controversy. Further, if petitioners no longer frequent Dallas, it is most unlikely that a sufficiently genuine threat of prosecution for possible future violations of the Dallas ordinance could be established.

Second, there is some question on this record as it now stands regarding the pattern of the statute's enforcement. Answers to interrogatories reveal an average of somewhat more than two persons per day were arrested in Dallas during seven specified months in 1972 for the statutory loitering offense. App. 68. Of course, on remand, the District Court will find it desirable to examine the current enforcement scheme in order to determine whether, indeed, there now is a credible threat that petitioners, assuming they are physically present in Dallas, might be arrested and charged with loitering. A genuine threat must be demonstrated if a case or controversy, within the meaning of Art. III of the Constitution and of the Declaratory Judgment Act, may be said to exist. See *Steffel* v. *Thompson*, 415 U. S., at 458–460. See gen-

erally *O'Shea* v. *Littleton,* 414 U. S. 488, 493–499 (1974); *Boyle* v. *Landry,* 401 U. S. 77, 81 (1971). Further, the credible threat must be shown to be alive at each stage of the litigation. *Steffel* v. *Thompson,* 415 U. S., at 459 n. 10, and cases cited therein.

Because of the fact that the District Court has not had the opportunity to consider this case in the light of *Steffel,* and because of our grave reservations about the existence of an actual case or controversy, we have concluded that it would be inappropriate for us to touch upon any of the other complex and difficult issues that the case otherwise might present. The District Court must determine that the litigation meets the threshold requirements of a case or controversy before there can be resolution of such questions as the interaction between the past prosecution and the threat of future prosecutions, and of the potential considerations, in the context of this case, of the *Younger* doctrine, of res judicata, of the plea of *nolo contendere,* and of the petitioners' failure to utilize the state appellate remedy available to them. Expunction of the records of the arrests and convictions and the nature of corrective action with respect thereto is another claim we do not reach at this time.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion. No costs are allowed.

It is so ordered.

MR. JUSTICE REHNQUIST, concurring.

I join the opinion of the Court, and add these few words only to indicate why I believe the Court is quite correct in leaving to the District Court on remand the issues treated in the dissenting opinion of my Brother POWELL and the concurring and dissenting opinion of my Brother WHITE.

The District Court granted respondents' motion to dismiss petitioners' complaint because it regarded a prior decision of the Court of Appeals, *Becker* v. *Thompson*, 459 F. 2d 919 (CA5 1972), as controlling. While it would have been more in keeping with conventional adjudication had that court first inquired as to the existence of a case or controversy, as suggested in the opinion of my Brother POWELL, I cannot fault the District Court for disposing of the case on what it quite properly regarded at that time as an authoritative ground of decision. Indeed, this Court has on occasion followed essentially the same practice. *Secretary of the Navy* v. *Avrech*, 418 U. S. 676 (1974); *United States* v. *Augenblick*, 393 U. S. 348 (1969). The Court of Appeals confirmed the District Court's understanding of the law when it affirmed by order, 475 F. 2d 1402 (CA5 1973).

Later this Court, in *Steffel* v. *Thompson*, 415 U. S. 452 (1974), reversed the decision of the Court of Appeals which that court and the District Court had regarded as dispositive of this case. In *Steffel*, we held that *Younger* v. *Harris*, 401 U. S. 37 (1971), did not bar access to the District Court when the plaintiff sought only declaratory relief and no state proceeding was pending, but the Court also emphasized that petitioner must present "an 'actual controversy,' a requirement imposed by Art. III of the Constitution." 415 U. S., at 458. Properly viewed, therefore, a remand for reconsideration in light of *Steffel* directs the District Court to consider whether the requisite case or controversy was and is presented, as well as to determine the appropriateness of declaratory relief.

I believe the Court's remand to the District Court, which will give that court an opportunity to reconsider the jurisdictional issues within the framework of *Steffel* and to pass in the first instance on the other issues that

my Brothers POWELL and WHITE would have us decide today, is entirely appropriate. Since I read the opinion of the Court as intimating no views on either of these questions that are contrary to those suggested by my dissenting Brethren, I am quite content to leave them for the consideration of the District Court in the first instance.

MR. JUSTICE WHITE, concurring in part and dissenting in part.

I join the opinion of the Court except insofar as it fails to affirm the dismissal in the courts below of petitioners' prayer for a mandatory injunction requiring the expunction of their criminal records. With respect to that issue, the prerequisite of a case or controversy is clearly present; but under *Younger* v. *Harris,* 401 U. S. 37 (1971), the District Court was plainly correct in dismissing the claim rather than ruling on its merits. *Huffman* v. *Pursue, Ltd.,* 420 U. S. 592 (1975), would appear to require as much.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, and THE CHIEF JUSTICE joins as to Part II, dissenting.

Petitioners were convicted in Dallas, Tex., Municipal Court, on pleas of *nolo contendere,* of violating the city's loitering ordinance. They were fined $10 each. Under Texas law petitioners had the right to a trial *de novo* in the County Court. Appellate review of an adverse County Court judgment imposing a fine in excess of $100 would have been available in the Texas Court of Criminal Appeals. A determination by the highest state court in which a decision could be had, if it upheld the constitutionality of the ordinance, would have been appealable to this Court. 28 U. S. C. § 1257 (2).

Petitioners deliberately elected to forgo these remedies, allowed their convictions in Municipal Court to become final, and thereafter filed this action under 42 U. S. C. § 1983 in the Federal District Court. Petitioners' complaint attacked the constitutionality of the ordinance and sought two forms of relief: [1] (i) an order, characterized by the District Court as a request for an injunction, expunging the records of petitioners' arrests and convictions for loitering; and (ii) a declaratory judgment that the ordinance is unconstitutional, *i. e.*, that it cannot constitutionally be applied to them in the future. The District Court denied the requested relief, and the Court of Appeals for the Fifth Circuit affirmed.

In its decision today, relying on *Steffel* v. *Thompson*, 415 U. S. 452 (1974), the Court reverses the decision of the Court of Appeals and remands the case for further consideration of petitioners' request for declaratory relief. The Court also finds it unnecessary to consider petitioners' prayer for expunction. I am in disagreement on both points. I would hold that any relief as to petitioners' previous arrests and convictions is barred by their *nolo contendere* pleas, equivalent under Texas law to pleas of guilty,[2] and by their deliberate decision to forgo state appellate remedies. As to prospective relief, I think that *Steffel* and the general principles of justiciability to which it adheres require affirmance, not a reversal and remand. In view of the undisputed facts in this case, we should decide these issues now. The ends of justice will not be served by a remand and further litigation. More-

[1] The complaint, couched in conclusory terms, does not specifically request a declaration that the ordinance cannot be applied to petitioners in the future. Petitioners' brief and argument in this Court nevertheless focused primarily on this relief, and the Court accepts this generous reading of the vague and general language of the complaint.

[2] *Ante*, at 428–429, n. 3.

over, today's decision, especially in its reading of *Steffel*, seems likely to confuse both the District Court in this case and other federal courts faced with an increasing number of cases raising similar problems.

I

I turn first to the retrospective relief sought by petitioners: their prayer for an order expunging the records of their arrests and convictions. The question raised by this prayer is whether a plaintiff may resort to § 1983 to attack collaterally his state criminal conviction when he has either knowingly pleaded guilty to the charge or failed to invoke state appellate remedies. This issue was raised in the courts below,[3] decided by those courts,[4] and argued to this Court.[5] As the Court recognizes, *ante*, at 435, this issue is unaffected by our decision in *Steffel*, which is relevant only to petitioners' request for prospective relief. Moreover, even if the case is moot insofar as it concerns prospective relief because petitioners no longer live in Dallas, that fact has no bearing on petitioners' request for expunction. Thus, I can see no justification for deferring resolution of this important issue.

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[3] Respondents did not expressly plead res judicata generally in bar of petitioners' constitutional claim. See Fed. Rule Civ. Proc. 8 (c). They did, however, argue that by their pleas of *nolo contendere* petitioners had waived any right to relitigate the validity of the Municipal Court convictions in federal court. Petitioners' counsel do not deny that this issue is here. Indeed, they frankly recognize that their clients are making "a collateral challenge to the validity of a state criminal conviction." Brief for Petitioners 6. See also *id.*, at 12 *et seq.*

[4] The District Court, in dismissing petitioners' complaint, relied on their pleas of *nolo contendere* and their failure to exhaust state remedies. App. 62. The Court of Appeals affirmed without opinion.

[5] One of the two "questions presented" by petitioners was whether they may "seek Federal equitable relief expunging any record of their arrest and conviction." Brief for Petitioners 2.

Collateral attack in federal court on state criminal convictions normally comes in habeas corpus proceedings under 28 U. S. C. § 2241 *et seq.* In such proceedings, the state court's resolution of a constitutional claim generally is not binding on the federal court. See *Brown* v. *Allen*, 344 U. S. 443 (1953). Petitioners, however, were neither incarcerated nor otherwise restrained as a result of their convictions and thus could not satisfy the custody requirement of habeas corpus jurisdiction. *E. g., Carafas* v. *LaVallee*, 391 U. S. 234 (1968). They accordingly proceeded under § 1983, seeking to have the ordinance invalidated, their convictions declared void, and the records thereof expunged.

The Court has never expressly decided whether and in what circumstances § 1983 can be invoked to attack collaterally state criminal convictions. The resolution of this general problem depends on the extent to which, in a § 1983 action, principles of res judicata bar relitigation in federal court of constitutional issues decided in state judicial proceedings to which the federal plaintiff was a party. But we need not resolve this general problem here.[6] For even assuming, *arguendo*, that the scope of

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[6] In *Preiser* v. *Rodriguez*, 411 U. S. 475, 497 (1973), the Court noted that several of the Courts of Appeals had held "res judicata . . . fully applicable to a civil rights action brought under § 1983" and that neither state convictions that do not result in confinement nor state civil judgments can be collaterally impeached in federal courts. Indeed, most of the Circuits have considered this question, either in the context of a prior state-court civil or criminal judgment, and each has so ruled. See *Mastracchio* v. *Ricci*, 498 F. 2d 1257 (CA1 1974), cert. denied, 420 U. S. 909 (1975); *Lackawanna Police Benevolent Assn.* v. *Balen*, 446 F. 2d 52 (CA2 1971); *Kauffman* v. *Moss*, 420 F. 2d 1270 (CA3), cert. denied, 400 U. S. 846 (1970); *Shank* v. *Spruill*, 406 F. 2d 756 (CA5 1969); *Coogan* v. *Cincinnati Bar Assn.*, 431 F. 2d 1209 (CA6 1970); *Williams* v. *Liberty*, 461 F. 2d 325 (CA7 1972); *Jenson* v. *Olson*, 353 F. 2d 825 (CA8 1965); *Scott* v. *California Supreme Court*, 426 F. 2d 300 (CA9 1970);

collateral attack is as expansive in § 1983 actions as it has been held to be in habeas corpus proceedings, I think it clear beyond question that petitioners' action for retrospective relief is barred. If petitioners had been confined as a result of their *nolo contendere* pleas and thereafter filed habeas corpus petitions in federal court, there can be no doubt that their petitions should have been dismissed. As noted above, the *nolo contendere* pleas were equivalent to guilty pleas. It is settled that when defendants plead guilty to state criminal charges, they may not seek federal habeas corpus relief on the basis of constitutional claims antecedent to and independent of the guilty pleas. *E. g., Tollett* v. *Henderson,* 411 U. S. 258, 267 (1973). In such circumstances, federal habeas petitioners may attack only "the voluntary and intelligent character" of the pleas. *Ibid.*[7] Moreover, when

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Metros v. *United States District Court for the District of Colorado,* 441 F. 2d 313 (CA10 1970). But cf. *Ney* v. *California,* 439 F. 2d 1285, 1288 (CA9 1971). The general principle that final judgments have res judicata effect and are binding on the parties is, of course, subject to the qualification that void judgments may be collaterally impeached. Restatement, Judgments § 11 (1942). Moreover, the question whether a judgment is void—*i. e.*, "without res judicata effect for purposes of the matter at hand"—depends, absent any indication of contrary congressional intent, on the nature of the defect alleged and the gravity of the harm asserted, viewed in light of the powerful public interest in finality of litigation. *Schlesinger* v. *Councilman,* 420 U. S. 738, 752–753 (1975). This general analysis applies as much to the scope of collateral attack in habeas corpus proceedings as to the scope of collateral attack in other federal civil actions. See *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 256–275 (1973) (POWELL, J., concurring). In my view, the harm asserted in habeas corpus proceedings—restraint on liberty—may justify a broader scope of collateral attack than would the kinds of injury normally concerned in actions under § 1983.

[7] Petitioners do not claim that their *nolo contendere* pleas were either involuntary or based on inadequate legal advice. See *McMann*

federal habeas petitioners deliberately have elected to forgo state appellate remedies afforded them, the federal court may deny relief.[8] *Fay* v. *Noia*, 372 U. S. 391, 438–439 (1963). When a state criminal defendant pleads guilty to state charges or refuses to invoke state appellate remedies, his conviction no longer can be said to rest on an alleged denial of a constitutional right. Instead, it rests solely on the defendant's refusal to litigate the asserted right. The only issue then cognizable on collateral attack is whether the refusal to litigate was knowing and voluntary. If it was, collateral attack based on the asserted constitutional claim is foreclosed. See *id.*, at 468–472 (Harlan, J., dissenting).

These established principles of federal habeas corpus jurisdiction should apply with at least equal force to attempts under § 1983 collaterally to attack state criminal

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v. *Richardson*, 397 U. S. 759 (1970). Nor is this case like *Blackledge* v. *Perry*, 417 U. S. 21 (1974). In that case the Court stated that the due process right at issue, closely analogous to the constitutional double jeopardy bar, was "the right not to be haled into court at all . . . ," so that "[t]he very initiation of the proceedings . . . operated to deny [petitioner] due process of law." *Id.*, at 30–31. The Court ruled, therefore, that petitioner's guilty plea did not preclude federal habeas corpus relief. In this case, however, petitioners' claim is that the ordinance under which they had been charged is unconstitutional. The alleged constitutional infirmity thus lies not in the "initiation of the proceedings" but in the eventual imposition of punishment that, assertedly, the State cannot constitutionally exact.

[8] Although petitioners could have secured a trial *de novo* in state court, they chose to forgo that opportunity, claiming they did not want to risk increased fines. There is no indication that petitioners' choice was anything other than knowing and intelligent, nor does the possibility of increased fines constitute the kind of "grisly" choice at issue in *Fay* v. *Noia*, 372 U. S. 391, 440 (1963). See Developments in the Law—Federal Habeas Corpus, 83 Harv. L Rev. 1038, 1106–1109 (1970).

convictions.[9] I would hold that § 1983 does not allow such deliberate circumvention of the state judicial processes, and that when a state defendant knowingly pleads guilty or fails to invoke state appellate remedies his conviction is not subject to impeachment in a § 1983 action.

II

With respect to petitioners' request for a declaration that the Dallas ordinance is unconstitutional and cannot be applied to them in the future, the Court holds that "[t]he principles and approach of *Steffel* are applicable" and remands for reconsideration in light of our opinion in that case. *Ante,* at 433, 434. In my view, this disposition seriously misreads our opinion in *Steffel.* It ignores the necessity, fully recognized in *Steffel,* that a complaint make out a justiciable case or controversy, the indispensable condition under Art. III to the exercise of federal judicial power.

A

The question, insofar as petitioners seek prospective relief, is whether the challenge to the constitutionality of the Dallas ordinance was presented, at the time the complaint was filed, in the context of a live controversy between the parties:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient imme-

[9] The question is not one of election of judicial fora, as it was in *Monroe* v. *Pape,* 365 U. S. 167 (1961), but instead whether a final state-court judgment may be collaterally impeached on grounds that could have been, but deliberately were not, raised in the state court.

> diacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

This test was met in *Steffel*. It is not even arguably met in this case.

The undisputed facts in *Steffel* showed that petitioner faced an imminent prospect of arrest and prosecution under the challenged state statute. He previously had engaged in distributing handbills at a shopping center, and on two occasions had been threatened with arrest if he continued his activity. On the second occasion, petitioner avoided arrest only by leaving the premises. His companion, who did not leave, was arrested and arraigned on a charge of criminal trespass. The parties stipulated that "if petitioner returned [to the shopping center] and refused upon request to stop handbilling, a warrant would be sworn out and he might be arrested and charged with a violation of the Georgia statute." 415 U. S., at 456. In light of these facts we said:

> "[P]etitioner has alleged threats of prosecution that cannot be characterized as 'imaginary or speculative'.... He has been twice warned to stop handbilling that he claims is constitutionally protected and has been told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted. The prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical,' *Poe* v. *Ullman*, 367 U. S. 497, 508 (1961). In these circumstances, it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Id.*, at 459.

As MR. JUSTICE STEWART put it in his concurring opinion:

> "The petitioner . . . has succeeded in objectively showing that the threat of imminent arrest, corroborated by the actual arrest of his companion, has created an actual concrete controversy between himself and the agents of the State." *Id.*, at 476.

The situation in the present case differs from that in *Steffel* in controlling respects. Petitioners previously had been arrested for "loitering" at 2 a. m. in a section of the city remote from their residences. Whether these arrests and petitioners' subsequent convictions could have survived constitutional challenge, had it timely been made, is a matter irrelevant to the present issue. Petitioners' previous arrests and convictions are relevant to the justiciability of their prayer for prospective relief only if they evidence a realistic likelihood that *petitioners* may be arrested again and, therefore, that the ordinance causes them real and immediate harm. See *O'Shea* v. *Littleton*, 414 U. S. 488, 496 (1974). These preconditions to the requisite justiciability simply do not exist in this case.

Application of the challenged Dallas ordinance depends, by its terms, on the facts of each case. It is extremely unlikely that the exact set of circumstances leading to the previous arrest and conviction of petitioners will ever be repeated. Petitioners' brief, attempting to accommodate to *Steffel*'s rationale, refers vaguely to "petitioners' fear of arrest and prosecution." [10] Read most generously, however, the complaint and supporting ma-

[10] Petitioners' complaint itself nowhere alleged that they feared or had reason to fear future arrest under the Dallas ordinance. The affidavit of petitioner Love, submitted to the District Court, stated that, since his arrest, he had been "very nervous about being out in public places, especially at night and in areas of town where there are numerous police officers." App. 53.

terials are barren of *any facts* relating petitioners' past arrests to a possibility of future arrests, or otherwise substantiating their asserted fears that the Dallas ordinance again will be invoked against them. The only basis for "fear" mentioned by counsel is the fact that loitering arrests were occurring in Dallas "at the rate of more than two per day." [11] But two arrests per day in a city of more than one million persons hardly represents a high-risk situation for anyone, and certainly poses no particularized threat to petitioners. Under the facts alleged in the complaint or appearing from other materials before the District Court, petitioners' position with respect to the challenged ordinance was no different from what it would have been had they never been arrested, and their chances of future prosecution no greater than those of any other person who used the streets of Dallas.[12]

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[11] App. 68. See Brief for Petitioners 8, 10.

[12] The several references in the Court's opinion to "threats of prosecution" must relate to the averment of general threat to the entire community, as the record is wholly devoid of any indication of present threat to petitioners. Of course, it is possible that any citizens, including petitioners, may be arrested under this ordinance. But "pleadings must be something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U. S. 669, 688 (1973). And although the pleadings must be construed liberally, Fed. Rule Civ. Proc. 8 (f), the complaint and supporting materials in this case make out at most that petitioners genuinely fear future arrest and prosecution. But more than a speculative and subjective concern must be shown, as otherwise the federal courts would be open to virtually any citizen who desired an advisory opinion. As MR. JUSTICE STEWART stated in his concurring opinion in *Steffel* v. *Thompson*, 415 U. S. 452 (1974): "Our decision . . . must not be understood as authorizing the invocation of federal declaratory judgment jurisdiction by a person who thinks a state criminal law is unconstitutional, even . . . if he honestly entertains the subjective belief that he may now or in the future be prosecuted under it." *Id.*, at 476.

B

In several cases we have found constitutional challenges to state and federal statutes justiciable despite the absence of actual threats of enforcement directed personally to the plaintiff. *E. g., Doe* v. *Bolton,* 410 U. S. 179, 188–189 (1973); *Lake Carriers' Assn.* v. *MacMullan,* 406 U. S. 498, 506–508 (1972). See *CSC* v. *Letter Carriers,* 413 U. S. 548, 551–553 (1973). In each such case, however, the challenged statute applied particularly and unambiguously to activities in which the plaintiff regularly engaged or sought to engage. In each case the plaintiff claimed that the State or Federal Government, by prohibiting such activities, had exceeded substantive constitutional limitations on the reach of its powers. The plaintiffs, therefore, were put to a choice.[13] Unless declaratory relief was available, they were compelled to choose between a genuine risk of criminal prosecution and conformity to the challenged statute, a conformity that would require them to incur substantial deprivation either in tangible form or in forgoing the exercise of asserted constitutional rights. In such circumstances we have recognized that the challenged statute causes the plaintiff present harm, and that the "controversy is both immediate and real." *Lake Carriers' Assn., supra,* at 508.

Steffel does not depart from this general analysis. The difference between *Steffel* and the above cases lies in the nature of the statute involved. *Steffel* concerned a general trespass ordinance that did not, on its face, apply particularly to activities in which Steffel engaged or sought to engage. The statute was susceptible of a multitude of applications that would not even arguably exceed constitutional limitations on state power. But the

[13] In all of these cases the statutes were not, through lack of enforcement, practical and legal nullities. See *Poe* v. *Ullman,* 367 U. S. 497 (1961).

threatened prosecution of Steffel, following the arrest and prosecution of his companion, demonstrated that the state officials construed the statute to apply to the precise activities in which Steffel had engaged and proposed to engage in the future. There was, therefore, no question that Steffel was confronted with a choice identical in principle and practical consequence to that faced by plaintiffs in the above cases: he could either risk criminal prosecution or forgo engaging in specific activities that he believed were protected by the First Amendment. Whichever choice he made, the harm to Steffel was real and immediate.

The pleadings in this case reveal no like circumstances. They merely aver that the Dallas ordinance has a "chilling" effect on First Amendment rights of speech and association. This averment, moreover, is related not to petitioners specifically, but rather to the "citizens of Dallas." [14] While it is theoretically possible that the ordinance may be applied to infringe petitioners' First Amendment rights, nothing in the facts relating to their respective prior arrests and convictions indicates that the ordinance has been so applied to petitioners or indeed to anyone else. In short, petitioners

[14] The closest the complaint comes to addressing the justiciability problem is the following passage:

"The sweeping scope of this ordinance means that *no citizen* is safe to carry on any conduct at any place in the City of Dallas, unless he can be telepathic and be assured that his behavior does not alarm or concern a police officer.

"The provision is violative of, and has a chilling effect upon, the free exercise of the First Amendment rights of Freedom of Association and Assembly, as well as Freedom of Speech, and similar chilling effect upon the fundamental right of Freedom of Movement. Section *31–60* is so sweeping in its potential applicability that any gathering, assembly, speech or other non-criminal behavior may subject the *citizens of Dallas* to arrest and conviction under its terms." App. 6–7. (Emphasis added.)

rely entirely on a speculative deterrent effect that the Dallas ordinance conceivably could have on the exercise of constitutional rights by all Dallas citizens. The complaint nowhere alleges that the ordinance has been applied to particular activities, assertedly within the scope of First Amendment protection, in which *petitioners* regularly engage or in which they would engage but do not because of fear of prosecution. Compare *CSC* v. *Letter Carriers, supra,* with *United Public Workers* v. *Mitchell,* 330 U. S. 75, 86–91 (1947). As the cases discussed above demonstrate, before a statute may be challenged on the ground that it deters the exercise of constitutional rights, the alleged restraint must in all events be personal to the complaining parties. "It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other." *United Public Workers, supra,* at 90.[15]

C

Petitioners' pleadings thus failed to demonstrate that they were suffering any "real and immediate" harm consequent to the enforcement of the Dallas ordinance. The Court's opinion, however, states that the District

[15] Shorn of its completely unsubstantiated First Amendment claims, the gravamen of petitioners' complaint is that the ordinance is unconstitutionally vague. But the objection to vagueness, purely as a matter of due process and devoid of First Amendment ramifications, rests in the possibility of discriminatory enforcement and in the unfairness of punishing a person who could not reasonably have predicted that the conduct in which he engaged was criminal. See, *e. g., Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972). As a general matter, therefore, the harm matures and the constitutional objection becomes justiciable only when and as to those against whom the statute is enforced.

Court and the Court of Appeals "had no reason to . . . determine the actual existence of a genuine threat of prosecution, or to inquire into the relationship between the past prosecution and the threat of prosecutions for similar activity in the future." *Ante*, at 433. To the contrary, I find it clear that the District Court did hold, erroneously, that petitioners' complaint stated a justiciable claim for prospective relief.[16] But even if, as the Court apparently believes, the District Court simply assumed a justiciable claim for relief, that in itself would constitute a departure from what I had thought to be the settled order of federal adjudication. The District Court's first obligation, here as in all cases, was to determine whether, taking the allegations of the complaint as true, petitioners' claim for prospective relief was justiciable. If it was not, then there was no need—indeed, no jurisdiction—to consider the claim further.

The situation here is similar to that in *O'Shea* v. *Littleton, supra*. In that case, the District Court dismissed the suit both for want of equitable jurisdiction to grant the relief prayed for and on the ground that the defendants were immune from suit. The Court of Appeals for the Seventh Circuit reversed, and we in turn reversed the decision of the Court of Appeals. What we said there is

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[16] For the purpose of ruling on respondents' motion to dismiss, the District Court "assumed as true every factual allegation in [petitioners'] complaint and also assume[d] that the City of Dallas will continue to enforce the ordinance and this may subject [petitioners] to future arrest and prosecution under the ordinance." App. 64. But in discussing *Reed* v. *Giarrusso*, 462 F. 2d 706 (CA5 1972), the District Court stated that the Court of Appeals in that case had concluded, "*as this court does in the case . . . sub judice*, that [petitioners] did have standing to sue since they had been arrested and alleged that they will continue to engage in the same conduct which brought about their arrests and that they fear future arrests and prosecutions." App. 65 n. 4 (emphasis added).

equally applicable here: "The complaint failed to satisfy the *threshold requirement* imposed by Art. III . . . that those who seek to invoke the power of federal courts must allege an actual case or controversy. . . . Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' " 414 U. S., at 493, quoting *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 617 (1973) (emphasis added).

There being no substantial controversy between the parties, petitioners' complaint, insofar as it sought prospective relief, should have been dismissed. The Court's opinion acknowledges that there is a serious question "whether a case or controversy exists *today*." (Emphasis added.) But the Court relates this question to facts, not of record, that have occurred *since* this suit was filed. *Ante*, at 434. In view of the concession made at argument that petitioners' whereabouts are unknown and that counsel was no longer in touch with them,[17] there is indeed serious question whether a justiciable controversy now exists. But the critical issue, and one that the Court declines to address, is whether the petitioners were entitled to invoke federal jurisdiction when they instituted suit.

A determination of present mootness is altogether immaterial to the question whether there was federal jurisdiction at the time declaratory relief initially was

[17] The Court's concern as to the existence of a case or controversy "today" is expressly related to a concession made in oral argument by counsel for petitioners more than two years after the filing of this suit, a concession which strongly suggests that the counsel were arguing the case as some sort of "private attorneys general" on behalf of "the citizens of Dallas," not on behalf of petitioners. Apparently petitioners are no longer interested in the case and were not even in communication with the counsel who purport to represent them.

sought. Only if a specific, live controversy existed between the parties at the threshold can federal jurisdiction attach. And only if the requisite justiciable controversy then existed may a court determine whether it persists at some subsequent stage of the case, or whether the requested relief properly can be granted.[18] In *Steffel* we adopted precisely this order of resolving just such issues; first, we found that the case was justiciable when filed; only then did we reach the question whether declaratory relief was proper in the circumstances and remand for a determination of whether with the passage of time the threat to Steffel had subsided. There is no occasion for a remand for any purpose when the record demonstrates indisputably that petitioners' prayer for prospective relief was not, at the outset, within the District Court's power to grant.

III

I am concerned by the Court's failure to decide whether, in the circumstances here, petitioners can attack collaterally their convictions under the ordinance. The Court's reticence should not be viewed as endorsing the appropriateness of collateral attack under § 1983 in these or any other circumstances. But this issue was decided by the District Court and, as Mr. Justice Harlan once said in similar circumstances, the Court's remand places the District Court "in the uncomfortable position where it will have to choose between adhering to its present decision—in my view a faithful reflection of this Court's

[18] As Mr. Justice Frankfurter stated in his opinion for the Court in *Longshoremen's Union* v. *Boyd*, 347 U. S. 222, 223 (1954): "[A]ppellee contends that the District Court . . . should have dismissed the suit for want of a 'case or controversy,' for lack of standing . . . to bring this action. . . . Since the first objection is conclusive, there is an end of the matter." See *O'Shea* v. *Littleton*, 414 U. S. 488, 504–505 (1974) (BLACKMUN, J., concurring in part).

past cases—or treating the remand as an oblique invitation from this Court to [reverse its decision]." *Scholle* v. *Hare,* 369 U. S. 429, 434 (1962) (dissenting opinion).

Equally important, the reversal and remand of this case—especially in an opinion stating that "the principles and approach of *Steffel* are applicable" to petitioners' request for declaratory relief—are likely to cause federal courts all over the country to think that *Steffel* must be read as having a far wider application than that decision itself warrants. Such a reading would expand the number and, more importantly, the kinds of occasions in which federal district courts properly can be called upon to issue declarations as to the constitutionality of state statutes. I perceive no reason why we should refrain from deciding the threshold justiciability issue, an issue critical to proper understanding and application of the *Steffel* decision. Again in the words of Mr. Justice Harlan, dissenting from the remand of a case that arose in the wake of *Baker* v. *Carr,* 369 U. S. 186 (1962): "Both the orderly solution of this particular case, and the wider ramifications that are bound to follow in the wake of [*Steffel*], demand that the Court come to grips now with the basic issue tendered by this case." *Scholle* v. *Hare, supra,* at 435.

In sum, I think the Court should resolve the major issues properly before us, issues as to which there is no factual dispute, rather than delay their resolution, impose unnecessary burdens upon the litigants, and risk widespread uncertainty among the federal judiciary.

JOHNSON *v.* RAILWAY EXPRESS AGENCY, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–1543. Argued December 11, 1974—Decided May 19, 1975

The timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission, pursuant to § 706 of Title VII of the Civil Rights Act of 1964, does not toll the running of the limitation period applicable to an action, based on the same facts, brought under 42 U. S. C. § 1981. Thus, in this case where petitioner waited over 3½ years after his cause of action for racial employment discrimination accrued before instituting an action under § 1981, that suit is time barred by the one-year limitation period imposed by applicable state law notwithstanding the fact that petitioner had filed the Title VII charge before that limitation period had expired. Pp. 457–467.

489 F. 2d 525, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined, and in Parts I–III of which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 468.

Deborah M. Greenberg argued the cause for petitioner. With her on the briefs were *Jack Greenberg, James M. Nabrit III, Morris J. Baller, Eric Schnapper, William E. Caldwell,* and *Louis H. Pollak.*

Arthur M. Wisehart argued the cause for respondent Railway Express Agency, Inc. With him on the briefs was *Peter G. Wolfe. James L. Highsaw, Jr.,* argued the cause and filed briefs for respondents Brotherhood of Railway Clerks et al.*

Solicitor General Bork, Assistant Attorney General Pottinger, Keith A. Jones, David L. Rose, Michael A. Middleton, and *Joseph T. Eddins* filed a brief for the United States as *amicus curiae.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission (EEOC), pursuant to § 706 of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, 42 U. S. C. § 2000e–5, tolls the running of the period of limitation applicable to an action, based on the same facts, instituted under 42 U. S. C. § 1981.

I

Petitioner, Willie Johnson, Jr., is a Negro. He started to work for respondent Railway Express Agency, Inc., now, by change of name, REA Express, Inc. (REA), in Memphis, Tenn., in the spring of 1964 as an express handler. On May 31, 1967, while still employed by REA, but now as a driver rather than as a handler, petitioner, with others, timely filed with the EEOC a charge that REA was discriminating against its Negro employees with respect to seniority rules and job assignments. He also charged the respondent unions, Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, with maintaining racially segregated memberships (white and Negro respectively). Three weeks later, on June 20, REA terminated petitioner's employment. Petitioner then amended his charge to include an allegation that he had been discharged because of his race.

The EEOC issued its "Final Investigation Report" on December 22, 1967. App. 14a. The report generally supported petitioner's claims of racial discrimination. It was not until more than two years later, however, on March 31, 1970, that the Commission rendered its decision finding reasonable cause to believe petitioner's charges. And 9½ more months went by before the

EEOC, on January 15, 1971, pursuant to 42 U. S. C. § 2000e–5 (e), as it then read, gave petitioner notice of his right to institute a Title VII civil action against the respondents within 30 days.[1]

After receiving this notice, petitioner encountered some difficulty in obtaining counsel. The United States District Court for the Western District of Tennessee, on February 12, 1971, permitted petitioner to file the right-to-sue letter with the court's clerk as a complaint, in satisfaction of the 30-day requirement. The court also granted petitioner leave to proceed *in forma pauperis*, and it appointed counsel to represent him. On March 18, counsel filed a "Supplemental Complaint" against REA and the two unions, alleging racial discrimination on the part of the defendants, in violation of Title VII of the 1964 Act *and* of 42 U. S. C. § 1981. The unions and REA respectively moved for summary judgment or, in the alternative, for dismissal of all claims.

The District Court dismissed the § 1981 claims as barred by Tennessee's one-year statute of limitations. Tenn. Code Ann. § 28–304 (Supp. 1974).[2] Petitioner's remaining claims were dismissed on other grounds.[3]

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[1] The applicable statute later was amended to allow a period of 90 days, after issuance of the notice, in which to bring the Title VII action. 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. III), as amended by Pub. L. 92–261, § 4 (a), 86 Stat. 106.

[2] "28–304. Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued."

[3] The District Court also based its dismissal of petitioner's § 1981 claim against REA on the alternative ground that he had failed to

In his appeal to the United States Court of Appeals for the Sixth Circuit, petitioner, with respect to his § 1981 claims, argued that the running of the one-year period of limitation was suspended during the pendency of his timely filed administrative complaint with the EEOC under Title VII. The Court of Appeals rejected this argument. 489 F. 2d 525 (1973). See also *Jenkins* v. *General Motors Corp.*, 354 F. Supp. 1040, 1045–1046 (Del. 1973). Because of an apparent conflict between that ruling, and language and holdings in cases from other Circuits,[4] we granted certiorari restricted to the limitation issue. We invited the Solicitor General to file a brief as *amicus curiae* expressing the views of the United States. 417 U. S. 929 (1974).

II

A. Title VII of the Civil Rights Act of 1964 was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974). It creates statutory rights against invid-

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exhaust his administrative remedies under the Railway Labor Act, 44 Stat. 577, 45 U. S. C. § 151 *et seq.* App. 102a. The Court of Appeals did not address the exhaustion argument. Inasmuch as we limited our grant of certiorari to the limitation issue, 417 U. S. 929 (1974), we have no occasion here to express a view as to whether a § 1981 claim of employment discrimination is ever subject to a requirement that administrative remedies be exhausted.

The claims against the unions were dismissed on res judicata grounds. App. 101a. The Court of Appeals agreed with that disposition. 489 F. 2d 525, 530 n. 1 (CA6 1973). This issue, also, was not included in our grant of certiorari.

[4] See, *e. g.*, *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011, 1017 n. 16 (CA5 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 156 U. S. App. D. C. 69, 84–86, n. 30, 478 F. 2d 979, 994–996, n. 30 (1973).

ious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights.

Anyone aggrieved by employment discrimination may lodge a charge with the EEOC. That Commission is vested with the "authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge." 415 U. S., at 44. Thus, the Commission itself may institute a civil action. 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. III). If, however, the EEOC is not successful in obtaining "voluntary compliance" and, for one reason or another, chooses not to sue on the claimant's behalf, the claimant, after the passage of 180 days, may demand a right-to-sue letter and institute the Title VII action himself without waiting for the completion of the conciliation procedures. 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. III). See H. R. Rep. No. 92–238, p. 12 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973).

In the claimant's suit, the federal district court is empowered to appoint counsel for him, to authorize the commencement of the action without the payment of fees, costs, or security, and even to allow an attorney's fee. 42 U. S. C. § 2000e–5 (f)(1) (1970 ed., Supp. III) and 42 U. S. C. § 2000e–5 (k). Where intentional engagement in unlawful discrimination is proved, the court may award backpay and order "such affirmative action as may be appropriate." 42 U. S. C. § 2000e–5 (g) (1970 ed., Supp. III). The backpay, however, may not be for more than the two-year period prior to the filing of the charge with the Commission. *Ibid.* Some District Courts have ruled that neither compensatory nor punitive damages may be awarded in the Title VII suit.[5]

[5] *Loo* v. *Gerarge*, 374 F. Supp. 1338, 1341–1342 (Haw. 1974);

Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. "[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 48. In particular, Congress noted "that the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U. S. C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H. R. Rep. No. 92–238, p. 19 (1971). See also S. Rep. No. 92–415, p. 24 (1971). Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under § 1981. 118 Cong. Rec. 3371–3373 (1972).

B. Title 42 U. S. C. § 1981, being the present codification of § 16 of the century-old Civil Rights Act of 1870, 16 Stat. 144, on the other hand, on its face relates primarily to racial discrimination in the making and enforcement of contracts. Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals [6]—and we now join them—that § 1981

Howard v. *Lockheed-Georgia Co.*, 372 F. Supp. 854, 855–856 (ND Ga. 1974); *Van Hoomissen* v. *Xerox Corp.*, 368 F. Supp. 829, 835–838 (ND Cal. 1973). Cf. *Humphrey* v. *Southwestern Portland Cement Co.*, 369 F. Supp. 832, 842–843 (WD Tex. 1973), rev'd on other grounds, 488 F. 2d 691 (CA5 1974).

[6] *Young* v. *International Tel. & Tel. Co.*, 438 F. 2d 757 (CA3 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F. 2d 1377 (CA4), cert. denied, 409 U. S. 982 (1972); *Caldwell* v. *Na-*

affords a federal remedy against discrimination in private employment on the basis of race. An individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. See, *e. g., Caperci* v. *Huntoon,* 397 F. 2d 799 (CA1), cert. denied, 393 U. S. 940 (1968); *Mansell* v. *Saunders,* 372 F. 2d 573 (CA5 1967). And a backpay award under § 1981 is not restricted to the two years specified for backpay recovery under Title VII.

Section 1981 is not coextensive in its coverage with Title VII. The latter is made inapplicable to certain employers. 42 U. S. C. § 2000e (b) (1970 ed., Supp. III). Also, Title VII offers assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees, items that are unavailable at least under the specific terms of § 1981.

III

Petitioner, and the United States as *amicus curiae,* concede, as they must, the independence of the avenues of relief respectively available under Title VII and the older § 1981. See *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 416–417, n. 20 (1968). Further, it has been noted that the filing of a Title VII charge and resort to Title VII's administrative machinery are not prerequisites for the institution of a § 1981 action. *Long* v. *Ford Motor Co.,* 496 F. 2d 500, 503–504 (CA6 1974); *Caldwell* v. *National Brewing Co.,* 443 F. 2d 1044, 1046 (CA5 1971), cert. denied, 405 U. S. 916 (1972); *Young* v. *In-*

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tional Brewing Co., 443 F. 2d 1044 (CA5 1971), cert. denied, 405 U. S. 916 (1972); *Long* v. *Ford Motor Co.,* 496 F. 2d 500 (CA6 1974); *Waters* v. *Wisconsin Steel Works,* 427 F. 2d 476 (CA7), cert. denied *sub nom. International Harvester Co.* v. *Waters,* 400 U. S. 911 (1970); *Brady* v. *Bristol-Meyers, Inc.,* 459 F. 2d 621 (CA8 1972); *Macklin* v. *Spector Freight Systems, Inc., supra.*

ternational Tel. & Tel. Co., 438 F. 2d 757, 761–763 (CA3 1971). Cf. *Waters* v. *Wisconsin Steel Works*, 427 F. 2d 476, 487 (CA7), cert. denied *sub nom. International Harvester Co.* v. *Waters*, 400 U. S. 911 (1970).

We are satisfied, also, that Congress did not expect that a § 1981 court action usually would be resorted to only upon completion of Title VII procedures and the Commission's efforts to obtain voluntary compliance. Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one. Under some circumstances, the administrative route may be highly preferred over the litigatory; under others, the reverse may be true. We are disinclined, in the face of congressional emphasis upon the existence and independence of the two remedies, to infer any positive preference for one over the other, without a more definite expression in the legislation Congress has enacted, as, for example, a proscription of a § 1981 action while an EEOC claim is pending.

We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent. With this base established, we turn to the limitation issue.

IV

A. Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under § 1981, the controlling period would ordinarily be the most appropriate one provided by state law. See *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914) (Civil Rights Act of 1871); *Auto Workers* v. *Hoosier Corp.*, 383 U. S. 696, 701–704 (1966) (Labor Management Relations Act); *Cope* v. *Anderson*, 331 U. S. 461 (1947) (National Bank Act); *Chattanooga Foundry* v. *Atlanta*, 203 U. S. 390 (1906) (Sherman Act); *Campbell* v. *Haverhill*, 155 U. S. 610 (1895) (Patent Act). For purposes of this case, the one-year limitation period in Tenn. Code Ann. § 28–304 (Supp. 1974) clearly and specifically has application.[7] See *Warren* v. *Norman Realty Co.*, 513 F. 2d 730 (CA8 1975). The cause of action asserted by petitioner accrued, if at all, not later than June 20, 1967, the date of his discharge. Therefore, in the absence of some circumstance that suspended the running of the limitation period, petitioner's cause of

[7] In the petition for certiorari it was argued that § 28–304 was inapplicable to petitioner's claim because that statute is limited to claims for damages, whereas petitioner sought injunctive relief as well as backpay. Our limited grant of certiorari foreclosed our considering whether some other Tennessee statute, such as Tenn. Code Ann. § 28–309 (1955) (six years for an action on a contract) or § 28–310 (1955) (10 years on an action not otherwise provided for), might be the appropriate one. We also have no occasion to consider whether Tennessee's express application of the one-year limitation period to federal civil rights actions is an impermissible discrimination against the federal cause of action, see *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543, 546–547 (CA8 1945), aff'd, 327 U. S. 757 (1946), or whether the enactment of the limitation period after the cause of action accrued, Tenn. Pub. Acts 1969, c. 28, did not touch the pre-existing federal claim.

action under § 1981 was time barred after June 20, 1968, over 2½ years before petitioner filed his complaint.

B. Respondents argue that the only circumstances that would suspend or toll the running of the limitation period under § 28–304 are those expressly provided under state law. See Tenn. Code Ann. §§ 28–106 to 28–115 (1955 and Supp. 1974) and 28–301 (1955). Petitioner concedes, at least implicitly, that no tolling circumstance described in the State's statutes was present to toll the period for his § 1981 claim. He argues, however, that state law should not be given so broad a reach. He claims that, although the duration of the limitation period is bottomed on state law, it is federal law that governs other limitations aspects, such as tolling, of a § 1981 cause of action. Without launching into an exegesis on the nice distinctions that have been drawn in applying state and federal law in this area,[8] we think it suffices to say that petitioner has overstated his case. Indeed, we may assume that he would argue vigorously in favor of applying state law if any of the Tennessee tolling provisions could be said to assist his cause.[9]

Any period of limitation, including the one-year period specified by § 28–304, is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point

[8] See generally Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66 (1955).

[9] At oral argument petitioner advanced just such a proposition with respect to the applicability of Tennessee's saving statute, Tenn. Code Ann. § 28–106 (1955). Tr. of Oral Arg. 14. See also Pet. for Cert. 21 n. 27.

at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

There is nothing anomalous or novel about this. State law has been followed in a variety of cases that raised questions concerning the overtones and details of application of the state limitation period to the federal cause of action. *Auto Workers* v. *Hoosier Corp.*, 383 U. S., at 706 (characterization of the cause of action); *Cope* v. *Anderson*, 331 U. S., at 465–467 (place where cause of action arose); *Barney* v. *Oelrichs*, 138 U. S. 529 (1891) (absence from State as a tolling circumstance). Nor is there anything peculiar to a federal civil rights action that would justify special reluctance in applying state law. Indeed, the express terms of 42 U. S. C. § 1988 [10] suggest that the contrary is true.

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[10] Title 42 U. S. C. § 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposi-

C. Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide. As the Court noted in *Auto Workers* v. *Hoosier Corp.*, 383 U. S., at 706–707, considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration.

Petitioner argues that a failure to toll the limitation period in this case will conflict seriously with the broad remedial and humane purposes of Title VII. Specifically, he urges that Title VII embodies a strong federal policy in support of conciliation and voluntary compliance as a means of achieving the statutory mandate of equal employment opportunity. He suggests that failure to toll the statute on a § 1981 claim during the pendency of an administrative complaint in the EEOC would force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance.

We have noted this possibility above and, indeed, it is conceivable, and perhaps almost to be expected, that failure to toll will have the effect of pressing a civil rights complainant who values his § 1981 claim into court before the EEOC has completed its administrative proceeding.[11] One answer to this, although perhaps not a highly satisfactory one, is that the plaintiff in his § 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed. But the fundamental answer to petitioner's argument lies in the fact—pre-

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tion of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

[11] We are not unmindful of the significant delays that have attended administrative proceedings in the EEOC. See, *e. g.*, *Chromcraft Corp.* v. *EEOC*, 465 F. 2d 745 (CA5 1972); *EEOC* v. *E. I. duPont deNemours & Co.*, 373 F. Supp. 1321, 1329 (Del. 1974).

sumably a happy one for the civil rights claimant—that Congress clearly has retained § 1981 as a remedy against private employment discrimination separate from and independent of the more elaborate and time-consuming procedures of Title VII. Petitioner freely concedes that he could have filed his § 1981 action at any time after his cause of action accrued; in fact, we understand him to claim an unfettered right so to do. Thus, in a very real sense, petitioner has slept on his § 1981 rights. The fact that his slumber may have been induced by faith in the adequacy of his Title VII remedy is of little relevance inasmuch as the two remedies are truly independent. Moreover, since petitioner's Title VII court action now also appears to be time barred because of the peculiar procedural history of this case, petitioner, in effect, would have us extend the § 1981 cause of action well beyond the life of even his Title VII cause of action. We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently.

V

Petitioner cites *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), and *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965), in support of his position. Neither case is helpful. The respective periods of limitation in those cases were derived directly from federal statutes rather than by reference to state law. Moreover, in each case there was a substantial body of relevant federal procedural law to guide the decision to toll the limitation period, and significant underlying federal policy that would have conflicted with a decision not to suspend the running of the statute.[12] In the

[12] In *Burnett*, the Court considered the effect of a prior filing of an action under the Federal Employers' Liability Act in state court on the applicable three-year FELA period of limitation. The action

present case there is no relevant body of federal procedural law to guide our decision, and there is no conflicting federal policy to protect.[13] Finally, and perhaps most importantly, the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted. This factor was more than a mere abstract or theoretical consideration because the prior filing in each case necessarily operated to avoid the evil against which the statute of limitations was designed to protect.[14]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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had been dismissed because under state law the venue was improper. In view of the express federal policy liberally allowing transfer of improper-venue cases, see 28 U. S. C. § 1406 (a), and the desirability of uniformity in the enforcement of FELA claims, the Court concluded that the prior filing tolled the statute. In *American Pipe* we considered the effect that a timely filed civil antitrust purported class action should have on the applicable four-year federal period of limitation. The District Court found the suit an inappropriate one for class action status. In the light of the history of Fed. Rule Civ. Proc. 23 and the purposes of litigatory efficiency served by class actions, we concluded that the prior filing had a tolling effect.

[13] We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently are actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under § 1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court.

[14] Petitioner argues that the timely filing of a charge with the EEOC has the effect of placing the charged employer on notice that a claim of discrimination is being asserted. Thus, petitioner argues,

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, concurring in part and dissenting in part.

In recognizing that Congress intended to supply aggrieved employees with independent but related avenues of relief under Title VII of the Civil Rights Act of 1964 and § 16 of the Civil Rights Act of 1870, 42 U. S. C. § 1981, the Court emphasizes the importance of a full arsenal of weapons to combat unlawful employment discrimination in the private as well as the public sector. The majority stands on firm ground in recognizing that both remedies are available to victims of discriminatory practices. Accordingly, I concur in Parts I–III of the Court's opinion.

But, the Court stumbles in its analysis of the relation between the two statutes on the tolling question. The majority concludes that the filing of a Title VII charge with the Equal Employment Opportunity Commission (EEOC) does not toll the applicable statute of limitations. It relies exclusively on state law for the period and effect of the limitation and discounts the importance of the federal policies of conciliation and avoidance of

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the employer has the opportunity to protect itself against the loss of evidence, the disappearance and fading memories of witnesses, and the unfair surprise that could result from a sudden revival of a claim that long has been allowed to slumber. See *Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348–349 (1944).

Even if we were to ignore the substantial span of time that could result from tacking the § 1981 limitation period to the frequently protracted period of EEOC consideration, we are not at all certain that a Title VII charge affords the charged party the protection that petitioner suggests. See, *e. g.*, *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F. 2d 125, 131 (CA6 1971). Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period. See generally Developments in the Law—Statutes of Limitation, 63 Harv. L. Rev. 1177, 1185–1186 (1950).

unnecessary litigation in this area. The majority recognizes these policies but concludes that tolling the statute of limitations for a § 1981 suit during the pendency of Title VII proceedings is not an appropriate means of furthering them. I disagree. The congressional purpose of discouraging premature judicial intervention and the absence of any real risk of reviving stale claims suggest the propriety of tolling here. On balance, I view the failure to apply the tolling principle as undermining the foundation of Title VII and frustrating the congressional policy of providing alternative remedies. I must, therefore, dissent from Parts IV and V of the opinion.

The Court sets out the circumstances that suspend a statute of limitations without close examination of the statute's equitable underpinnings. According to the majority, the federal court is deprived of authority to toll the state statute because it borrows both "the State's wisdom in setting a limit, [as well as] exceptions thereto," *ante*, at 464, and offers no special reason for reluctance to apply the "overtones" of the period to a federal civil rights action. As a general practice, where Congress has created a federal right without prescribing a period for enforcement, the federal courts uniformly borrow the most analogous state statute of limitations. The applicable period of limitations is derived from that which the State would apply if the action had been brought in a state court. See, *e. g.*, *Auto Workers* v. *Hoosier Corp.*, 383 U. S. 696 (1966); *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914). See also *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 556 n. 27 (1974). For the purposes of this case the § 1981 action is governed by the District Court's application of the one-year Tennessee provision for "actions . . . brought under the federal civil rights statutes." Tenn. Code Ann. § 28–304 (Supp. 1974). See *ante*, at 462 n. 7.

Congress' failure to include a built-in limitations period in § 1981 does not automatically warrant "an imprimatur on state law" and sanction the borrowing of both the effect as well as the duration from state law. *Auto Workers* v. *Hoosier Corp., supra,* at 709 (WHITE, J., dissenting); *Holmberg* v. *Armbrecht, supra,* at 394–395; *Board of Comm'rs* v. *United States,* 308 U. S. 343 (1939). It is well settled that when federal courts sit to enforce federal rights, they have an obligation to apply federal equity principles:

> "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Holmberg* v. *Armbrecht, supra,* at 395.

See also *Moviecolor, Ltd.* v. *Eastman Kodak Co.,* 288 F. 2d 80 (CA2), cert. denied, 368 U. S. 821 (1961).

The effect to be given the borrowed statute is thus a matter of judicial implication. Simply stated, we must determine whether the national policy considerations favoring the continued availability of the § 1981 cause of action outweigh the interests protected by the State's statute of limitations. See *Auto Workers* v. *Hoosier Corp., supra,* at 708; *Holmberg* v. *Armbrecht, supra,* at 395.

I

Title VII and now § 1981 both express the federal policy against discriminatory employment practices. *Emporium Capwell Co.* v. *WACO,* 420 U. S. 50, 66 (1975); *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 800 (1973); *Griggs* v. *Duke Power Co.,* 401 U. S. 424, 429–430 (1971). As we have recently observed, "legislative enactments in this area have long evinced a

general intent to accord parallel or overlapping remedies against discrimination." *Alexander* v. *Gardner-Denver Co., supra,* at 47. It is this general legislative intent that must guide us in determining whether congressional purpose with respect to a particular statute is effectuated by tolling the statute of limitations.

A full exposition of the statutory origins of § 1981 with respect to prohibition against private acts of discrimination is set out in *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968). In construing § 1982, a sister provision to § 1981, we concluded that Congress intended to prevent private discriminatory deprivations of all the rights enumerated in § 1 of the 1866 Act, including the right to contract. 392 U. S., at 426. The Court's recognition of a proscription in § 1981 against private acts of employment discrimination, *ante,* at 459–460, reaffirms that the early Civil Rights Acts reflect congressional intent to "speak . . . of *all* deprivations . . . whatever their source." *Griffin* v. *Breckenridge,* 403 U. S. 88, 97 (1971); see also *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229 (1969).

The legislative history of Title VII and its 1972 amendments demonstrates that Congress intended to provide a coordinated but comprehensive set of remedies against employment discrimination. The short statute of limitations and the procedural prerequisites to Title VII actions emphasized the need to preserve the remedy of a suit under the 1870 legislation, which did not suffer from the same procedural restrictions as the latter enactment. See H. R. Rep. No. 92–238, p. 19 (1971); S. Rep. No. 92–415, p. 24 (1971). See also 118 Cong. Rec. 3370 (1972). Congressional sentiment was that "[b]y strengthening the administrative remedy [it] should not also eliminate preexisting rights which the Constitution and [the Congress had] accorded to aggrieved individ-

uals." *Id.*, at 3371. While encouragement of private settlement to avoid unnecessary litigation under Title VII and the preservation of an independent § 1981 action may appear somewhat at odds, the two themes are reconciled in the context of their joint remedial purpose: devising a flexible network of remedies to guarantee equal employment opportunities. See, *e. g.*, *Guerra* v. *Manchester Terminal Corp.*, 498 F. 2d 641, 650 (CA5 1974); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F. 2d 1011, 1017 (CA5 1971); *Macklin* v. *Spector Freight Systems, Inc.*, 156 U. S. App. D. C. 69, 84–86, n. 30, 478 F. 2d 979, 994–996, n. 30 (1973). See also *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (CA5 1970).

In *Alexander* v. *Gardner-Denver, supra,* we examined the relationship between compulsory arbitration and litigation under Title VII, a relationship analogous to that between the EEOC factfinding and conciliation process and litigation under § 1981, and accommodated both avenues of redress. The reasoning leading to that result is equally compelling here. Forced compliance with a short statute of limitations during the pendency of a charge before the EEOC would discourage and/or frustrate recourse to the congressionally favored policy of conciliation, *Alexander* v. *Gardner-Denver Co.*, 415 U. S., at 44, and "[t]he possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." *Id.*, at 59. Cf. *American Pipe & Constr. Co.* v. *Utah*, 414 U. S., at 555–556.

Congressional effort, with the 1972 amendments, to strengthen the administrative remedy by increasing EEOC's ability to conciliate complaints is frustrated by the majority's requirement that an employee file the § 1981 action prior to the conclusion of the Title VII conciliation efforts in order to avoid the bar of the

statute of limitations.[1] Legislative pains to avoid unnecessary and costly litigation by making the informal investigatory and conciliatory offices of EEOC readily available to victims of unlawful discrimination cannot be squared with the formal mechanistic requirement of early filing for the technical purpose of tolling a limitations statute. In sum, the federal policies weigh strongly in favor of tolling.

II

Examination of the purposes served by the statute of limitations indicates that they would not be frustrated by adoption of the tolling rule. Statutes of limitations are designed to insure fairness to defendants by preventing the revival of stale claims in which the defense is hampered by lost evidence, faded memories, and disappearing witnesses, and to avoid unfair surprise. None of these factors exists here.

Respondents were informed of the petitioner's grievances through the complaint filed with the Commission and conciliation negotiations. The charge filed with the EEOC and the § 1981 claim arise out of the same factual circumstances. The petitioner in this case diligently pursued the informal procedures before the Commission and adhered to the congressional preference for conciliation prior to litigation. Now, when Johnson asserts his right to proceed with litigation under § 1981 after his good-faith, albeit unnecessary, compliance with Title VII procedures, the majority interposes the bar of the Tennessee statute of limitations which clearly was not designed to include such cases.[2]

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[1] Loss of the § 1981 cause of action would deprive the aggrieved employee of the opportunity to recover punitive damages and more ample backpay.

[2] Under the Court's no-tolling principle petitioner's discharge on June 20, 1967, activated the statute which subsequently ran on

In my judgment, following the antitolling position of the Court to its logical conclusion produces an inequitable result. Aggrieved employees will be forced into simultaneously prosecuting premature § 1981 actions in the federal courts. In essence, the litigant who first explores conciliation prior to resort to litigation must file a duplicative claim in the district court on which the court will either take no action until the Title VII proceedings are concluded or proceed in frustration of the EEOC attempts to conciliate. No federal policy considerations warrant this waste of judicial time and derogation of the conciliation process.

Adoption of the tolling principle, however, protects the federal interest in both preserving multiple remedies for employment discrimination and in the proper function of the limitations statute. As a normal consequence tolling works to suspend the operation of a statute of limitations during the pendency of an event or condition. See *American Pipe & Construction Co.* v. *Utah*, 414 U. S., at 560 561; *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 427 (1965). In *American*

June 20, 1968—two years prior to his receipt of the right-to-sue letter! The majority suggests that even if the statute were tolled during the consideration of the EEOC charge and the initial court proceedings, petitioner's Title VII action may be time barred because of the unusual procedural history of the case, requiring the Court to extend his § 1981 claim beyond that arising out of Title VII. But our limited grant of certiorari forecloses consideration of the timeliness of the Title VII claim.

In any event this case reflects no departure from the normal rule of tolling. Consistent with the common understanding that tolling entails a suspension rather than an extension of a period of limitations, petitioner is allowed whatever time remains under the applicable statute, as well as the benefit of any state saving statute. Under Tenn. Code Ann. § 28–106 (1955) an action dismissed without prejudice may be reinstituted within a year of dismissal. The filing here falls well within that time frame.

Pipe we held that the initiation of a timely class action tolled the running of the limitation period as to individual members of the class, enabling them to institute separate actions after the District Court found class action an inappropriate mechanism for the litigation. In similar manner the *Burnett* court viewed the initiation of a timely Federal Employers' Liability Act suit in state court as tolling the statute of limitations for the later filing of a federal action following dismissal of the state proceeding for improper venue. The Court's analysis in both cases rested on the conclusion that each plaintiff had by his prior action given the defendant timely notice in a manner that "fulfilled the policies of repose and certainty inherent in the limitation provisions and tolled the running of the period." *American Pipe & Construction Co.* v. *Utah, supra,* at 558.

Although the length of the limitation in these cases was fixed by federal statute, the tolling rationale is equally adaptable to protect subsequent litigation when the duration period is established by state statute. The federal policy in favor of continuing availability of multiple remedies for persons subject to employment discrimination is inconsistent with the majority's decision not to suspend the operation of the statute. As long as the claim arising under § 1981 is essentially limited to the Title VII claim, staleness and unfair surprise disappear as justification for applying the statute.[3] Additionally, the difference in statutory origin for the right asserted under the EEOC charge and the subsequent § 1981 suit is of no consequence since the claims are

[3] Where there are differences between the § 1981 claim and the Title VII complaint, the district courts could easily limit the tolling to those portions of the § 1981 claim that overlapped the Title VII allegations. Cf. *EEOC* v. *Louisville & N. R. Co.,* 505 F. 2d 610, 617 (CA5 1974); *Sanchez* v. *Standard Brands,* 431 F. 2d 455, 466 (CA5 1970).

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essentially equivalent in substance. Cf. *Alexander* v. *Gardner-Denver, supra.* Since the EEOC charge gives notice that petitioner also has a grievance under § 1981, that filing, like the initial litigation in *Burnett* and *American Pipe,* satisfied the equitable policies underlying the limitation provision. *American Pipe & Construction Co.* v. *Utah, supra,* at 558.

Neither the legislative history of these Acts nor the avowed purposes of statutes of limitations foreclose good-faith resort to the administrative procedures of the EEOC. Adoption of the tolling theory avoids the Draconian choice of losing the benefits of conciliation or giving up the right to sue, yet preserves the independent nature of the § 1981 action. Accordingly, I would reverse the court below on this point.

DALLAS COUNTY, ALABAMA, ET AL. *v.* REESE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–1077. Decided May 19, 1975

The Alabama statutory system providing for countywide balloting for each of the four members of the Dallas County Commission, but requiring that a member be elected from each of the four residency districts, is not unconstitutional though the populations of the four districts vary widely, with the result that only one Selma resident can be a commission member, although the city contains about one-half of the county's population. *Fortson* v. *Dorsey*, 379 U. S. 433; *Dusch* v. *Davis*, 387 U. S. 112. Because the districts are used "merely as the basis of residence for candidates, not for voting or representation," *Fortson, supra*, at 438; *Dusch, supra*, at 115, each commissioner represents the citizens of the entire county and not merely those of the district in which he resides. While a system of unequal residency districts is not immune in all circumstances from constitutional attack, the Court of Appeals did not base its decision on the factual conclusions necessary to support a successful challenge in particular cases.

505 F. 2d 879, reversed and remanded.

PER CURIAM.

Appellees are residents of the city of Selma, Ala., who brought this action to challenge the system by which members of the Dallas County, Ala., Commission are elected. The system, which is established by a state statute,[1] provides for countywide balloting for each of the four commission members, but requires that a member be elected from each of four residency districts.[2] Ap-

[1] Act No. 328, § 6, Acts of Alabama (Feb. 8, 1901) (as amended). Our appellate jurisdiction is based on 28 U. S. C. § 1254 (2).

[2] The Judge of Probate of Dallas County is ex officio chairman of the commission, and votes in the case of a tie vote among the

pellees' constitutional claim was premised on the fact that the populations of the four districts vary widely, with the result that only one resident of the city of Selma can be a member of the commission, although the city contains about one-half of the county's population.[3]

After extensive discovery, the United States District Court for the Southern District of Alabama entered summary judgment for appellants, Dallas County and the members of the Dallas County Commission. The court relied heavily on our decision in *Dusch* v. *Davis*, 387 U. S. 112 (1967), and concluded:

> "[T]he fundamental principle of representative government has been fulfilled in that each County Commissioner's tenure depends upon the vote of the qualified voters from the countywide electorate. This fact alone requires each County Commissioner to represent the county and not his own residential area." Jurisdictional Statement 15–16.

The Court of Appeals for the Fifth Circuit considered the case en banc and reversed, 8–6.[4] 505 F. 2d 879 (1974). The majority concluded that the unequal residency districts diluted the votes of city residents, and that the resulting discrimination was invidious. It distinguished *Dusch* on the basis of the particular facts of that case, which involved seven council mem-

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commissioners. He is elected by countywide ballot and may reside anywhere within the county.

[3] As shown by the 1970 official census, the population of each of the residency districts is as follows:

City of Selma	27,379
West	6,209
South	14,203
Fork	7,505

[4] Judge Bell concurred in part and dissented in part. He would have remanded to the District Court for an evidentiary hearing on the question of invidious discrimination.

bers elected from unequal residency boroughs, and four council members who could live anywhere in the city; according to the Court of Appeals, the effect was to assure that a majority of the 11-man council could not be assembled without the cooperation of either one "representative" of the heavily populated boroughs or of one member of unrestricted residency. In the present case, on the other hand, the structure of the commission is such that the three commissioners who reside outside of Selma can control the commission, even though they "represent" only a slight majority of the population.[5] The dissenters in the Court of Appeals thought that *Dusch* controlled. We agree, and reverse the Court of Appeals.

Dusch reaffirmed the principle enunciated in *Fortson* v. *Dorsey*, 379 U. S. 433, 438 (1965), that when an official's "tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the

[5] In fashioning this distinction of *Dusch*, the Fifth Circuit relied on a prior decision of a panel of that court, *Keller* v. *Gilliam*, 454 F. 2d 55 (1972). According to the Court of Appeals, and for the reasons stated in the text, "[i]n *Keller*, as in the present case, preserving majority rule was not possible, and the plan was struck down." 505 F. 2d 879, 885 (1974).

Given the populations of the four residence districts, see n. 3, *supra*, it is difficult to understand how the Fifth Circuit's distinction of *Dusch* is applicable even to the facts of this case. According to the 1970 census, the city district has a population of 27,379, while the three rural districts have a combined population of 27,917. Thus should the commissioners who reside in the rural districts vote together, their control of the commission does in fact reflect their "representation" of a majority of the county's population. Nor is it possible in any other fashion to obtain a majority of the commission without the votes of either commissioners "representing" a majority of the county's population or of the Judge of Probate whose residency is unrestricted. These facts have no bearing on our disposition of this case, but they do seem to be inconsistent with the rationale on which the Court of Appeals based its decision.

county, and not merely those of people in his home district." Because the districts in the present plan are used "merely as the basis of residence for candidates, not for voting or representation," *ibid.; Dusch* v. *Davis*, *supra*, at 115, each commissioner represents the citizens of the entire county and not merely those of the district in which he resides. We think that this teaching of *Dusch* and of *Fortson* v. *Dorsey* was all but ignored by the Court of Appeals, which chose instead to focus on a factual element of *Dusch* which was accorded absolutely no significance in the opinion in that case. Nor do we understand what significance could be attached to the presence of council members subject to no residence requirement, given the basic teaching that elected officials represent all of those who elect them, and not merely those who are their neighbors.

The Court of Appeals was, of course, correct in recognizing that *Dusch* does not entirely insulate a plan such as this from constitutional attack. As that opinion noted: "If a borough's resident on the council represented in fact only the borough, . . . different conclusions might follow." 387 U. S., at 116. Similarly, in *Dusch* we approvingly quoted a portion of the District Court's opinion, including the following passage:

> "'As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.'" *Id.*, at 117.

We think it clear, however, that *Dusch* contemplated that a successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population. Rather than basing its decision on a factual con-

clusion of this sort, the Court of Appeals relied on a theoretical presumption to reach its determination that residents of Selma were victims of invidious discrimination. That theoretical presumption is that elected officials will represent the districts in which they reside rather than the electorate which chooses them. But that is precisely the proposition rejected in *Dusch*.

For the foregoing reasons, the judgment of the Court of Appeals must be reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

PITCHESS, SHERIFF *v.* DAVIS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1128. Decided May 19, 1975

On respondent's direct appeal from a rape conviction, the California appellate courts rejected his contention that the prosecution's failure to turn over to him an exculpatory laboratory report stating that scientific tests failed to reveal the presence of sperm on vaginal smear slides taken from the victim or on her clothing, violated his right to a fair trial. Subsequently the Federal District Court upheld such contention in a habeas corpus petition and issued a conditional writ compelling respondent's release unless the State provided him with the report and retried him, and the Court of Appeals affirmed. But in advance of the scheduled retrial, it was discovered that the slides and the victim's clothing had been routinely destroyed after respondent's conviction had become final, and respondent moved to dismiss the charges on the ground that the destruction of this evidence deprived him of the opportunity for a fair trial. After the trial court had denied this motion, the California Court of Appeal and the Supreme Court denied respondent's applications for writs of prohibition. In the meantime the District Court granted respondent's motion to replace the conditional writ of habeas corpus with an absolute writ because of the destruction of evidence, and the Court of Appeals affirmed. *Held:* Respondent failed to exhaust available state remedies on the claim that formed the basis for the unconditional writ, and hence he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted.

(a) Since the state appellate courts' denials of respondent's applications for writs of prohibition cannot be fairly taken to adjudicate the merits of his claim, and full posttrial appellate review is available if respondent is convicted again on retrial, the denial of the applications did not exhaust respondent's available state remedies.

(b) Neither Fed. Rule Civ. Proc. 60 (b), which permits a district court to grant relief from a final order, nor 28 U. S. C. § 2254, which requires exhaustion of available state remedies as

a precondition to consideration of a federal habeas corpus petition, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court.

Certiorari granted; reversed and remanded.

PER CURIAM.

Respondent Davis was convicted in 1967 in the Superior Court of Los Angeles County of rape, kidnaping, and oral copulation; he was sentenced to state prison. On direct appeal in the California courts, respondent argued, *inter alia,* that the failure of the state prosecutor in his case to turn over to him an exculpatory laboratory report, despite his request for all material reports, violated his Fourteenth Amendment right to a fair trial under our decision in *Brady* v. *Maryland,* 373 U. S. 83 (1963). The laboratory report stated that scientific tests by police officials failed to reveal the presence of sperm either on vaginal smear slides taken from the victim after the rape or on clothing worn by the victim at the time of the rape. State courts rejected this contention on direct appeal.

Respondent twice unsuccessfully pursued this contention in petitions for habeas corpus filed under 28 U. S. C. § 2254 in the United States District Court for the Central District of California. In 1972 a third habeas corpus petition in that court proved more successful, and the District Court ruled that the failure of the prosecutor to supply respondent with the laboratory report denied him a fair trial under *Brady, supra.* The court issued a conditional writ of habeas corpus which provided that habeas corpus would issue, compelling the petitioner to release respondent from custody, unless California provided respondent with the laboratory report and moved to retry him within 60 days. This judgment was affirmed

by the United States Court of Appeals for the Ninth Circuit.[1]

California moved to retry respondent in accordance with the terms of the conditional writ, and the case was set for trial in state court. The laboratory report forming the basis of respondent's *Brady* claim was turned over to him. In a discovery motion made in advance of trial, respondent requested the State to make the vaginal smear slides and clothing worn by the victim at the time of the rape available to him. Although this physical evidence had been available at respondent's prior trial, it was destroyed as a matter of police routine sometime during the six years between the time respondent's conviction became final and issuance of the conditional writ of habeas corpus.

Respondent then moved in state court to dismiss the charges against him on the grounds that the routine destruction of this physical evidence constituted an incurable suppression of exculpatory evidence in violation of *Brady* which deprived him of any opportunity, present or future, to a fair trial. After a hearing the state trial court denied respondent's motion, finding that the physical evidence had not been willfully suppressed and further finding that it would not have materially aided respondent's defense.

Respondent then filed an application for a writ of prohibition in the California Court of Appeal. During

[1] The opinions of state courts on respondent's direct appeal and of the District Court and Court of Appeals in the original habeas proceedings are unpublished. The opinion of the District Court in the subsequent modification proceeding is reported at 388 F. Supp. 105 (1974) and the Court of Appeals' affirmance of this decision is reported at 518 F. 2d 141 (1974). Neither the merits of respondent's original *Brady* claim relating to suppression of the laboratory report nor the merits of respondent's later claim relating to the unavailable physical evidence are before us.

the pendency of this application, he also filed a motion in the United States District Court seeking to "modify" its prior conditional writ of habeas corpus and replace it with an order granting an absolute writ and enjoining any retrial on the pending state charges. The basis for this motion was the destruction of the clothing and slides. The District Court temporarily enjoined the pending retrial[2] but deferred ruling on respondent's motion.

The California Court of Appeal and the California Supreme Court denied respondent's applications for writs of prohibition without opinion. The District Court then, without permitting the trial to proceed in the state court, conducted a hearing of its own. The court held that destruction of the slides and clothing violated *Brady, supra.* In the opinion of the court the destruction of this evidence precluded certain additional scientific testing which might possibly have established that respondent was not the perpetrator of the crime, and since this defect was incurable, the court found that respondent could never receive a fair trial on the charges. Respondent's motion was granted.[3] The United States Court of

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[2] In view of our disposition of this case, we have no occasion to consider the application of our decision in *Younger* v. *Harris,* 401 U. S. 37 (1971), to these facts.

[3] The amended order of the District Court provided:

"IT IS ORDERED, ADJUDGED AND DECREED:

"1. Peter J. Pitchess, Sheriff of Los Angeles County, California, or whosoever may have custody of Charles Edward Davis, shall discharge Charles Edward Davis from custody insofar as he is held in custody by nature of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

"2. Charles Edward Davis is released and discharged from any and all restraints which may have been imposed upon him by reason

Appeals for the Ninth Circuit affirmed, and petitioner sought certiorari here from that judgment.

Habeas corpus jurisdiction of persons in custody pursuant to the judgment of a state court is conferred on federal courts by 28 U. S. C. § 2254. That statute requires exhaustion of available state remedies as a precondition to consideration of a federal habeas corpus petition:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

See, *e. g.*, *Nelson* v. *George*, 399 U. S. 224, 229 (1970); *Irvin* v. *Dowd*, 359 U. S. 394, 404–405 (1959); *Ex parte Royall*, 117 U. S. 241 (1886).

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of his conviction in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles.

"3. Pursuant to the provisions of 28 U. S. C. § 2251 all proceedings which have been taken or which may hereafter be taken against Charles Edward Davis in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are stayed.

"4. Any and all proceedings taken against Charles Edward Davis in Case No. A220869 in the Superior Court of the State of California for the County of Los Angeles are void.

"5. The court retains jurisdiction over this habeas corpus proceeding for all purposes."

In the instant case, the unavailability of the physical evidence sought by respondent in connection with his retrial was never raised until he filed his pretrial motion in state court to dismiss the charges.[4] The issue was neither raised in nor considered by state courts during the course of his direct appeal from the first conviction or by the federal courts during the proceedings resulting in issuance of the conditional writ of habeas corpus. And respondent does not contest that, should he be convicted upon retrial, full appellate review in state courts will be available on whatever contentions he chooses to raise concerning the nonavailability of the physical evidence now sought.

Under our decision in *Picard* v. *Connor*, 404 U. S. 270 (1971), exhaustion of state remedies is required as a prerequisite to consideration of each claim sought to be presented in federal habeas:

> "We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent 'unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution,' *Ex parte Royall, supra*, at 251, it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Id.*, at 275–276.

While recognizing the exhaustion requirement for in-

[4] The failure to raise a claim relating to the unavailability of the physical evidence for purposes of retrial on either direct appeal or in the original federal habeas proceedings did not stem from any lack of diligence on respondent's part. Since the physical evidence was available at the original trial, it appears unlikely that respondent could have discovered its unavailability in advance of preparations for retrial.

voking federal habeas relief, the Court of Appeals found that § 2254 did not preclude consideration of the additional contention raised in respondent's motion to amend the District Court's original conditional order for two reasons.

First, the Court of Appeals felt that respondent's effort to secure a writ of prohibition from the state appellate courts on the grounds of destruction of the physical evidence constituted sufficient exhaustion of state remedies under these circumstances.

Both the California Court of Appeal and the California Supreme Court denied the applications without opinion. In California it is well established that a writ of prohibition is an extraordinary writ, whose use for pretrial review is normally limited to "questions of first impression and general importance." *People* v. *Medina,* 6 Cal. 3d 484, 491, 492 P. 2d 686, 690 (1972) (en banc). The denial of an application for writ of prohibition does not constitute, and cannot be fairly read as, an adjudication on the merits of the claim presented. Inclusion of an asserted point of error in a denied pretrial application for writ of prohibition does not bar raising the same points on post-trial direct appeal. *Ibid.*

In *Ex parte Hawk,* 321 U. S. 114, 116 (1944), we held that denial of an application for an extraordinary writ by state appellate courts did not serve to exhaust state remedies where the denial could not be fairly taken as an adjudication of the merits of claims presented, and where normal state channels for review were available. In the instant case, denial by state appellate courts of respondent's applications cannot be fairly taken to be an adjudication of the merits of his claim and full post-trial appellate review is available if respondent is convicted. On these facts, the denial of respondent's applications did not serve to exhaust his available state remedies.

The second reason advanced by the Court of Appeals was that the exhaustion requirement is inapplicable to the new contention raised in respondent's motion, since the motion was authorized under Fed. Rule Civ. Proc. 60 (b)(6) as a motion for relief from a final order. It reasoned that since the District Court would have granted an absolute writ if it had been presented with the destruction of the physical evidence at the time of issuance of the conditional writ, the District Court was justified under this rule in amending its prior judgment to make the writ absolute.

Rule 60 (b) provides in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

The Rule does not by its terms speak to the requirement of exhaustion of remedies as a prerequisite for federal habeas relief. The exhaustion requirement, *Picard* v. *Connor*, 404 U. S., at 276, is statutorily incorporated in 28 U. S. C. §§ 2254 (b) and (c), and Fed. Rule Civ. Proc. 81 (a)(2) provides:

> "These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States . . . ."

Since the exhaustion requirement is statutorily codified, even if Rule 60 (b) could be read to apply to this situation it could not alter the statutory command. The second reason advanced by the Court of Appeals is not persuasive, therefore, unless it was correct in its reasoning on the issue of exhaustion. We believe for the rea-

sons previously stated that it was incorrect in its treatment of the exhaustion issue.

Respondent failed to exhaust available state remedies on the claim which formed the basis for the unconditional writ, and he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted. Neither Rule 60 (b), 28 U. S. C § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court. Cf. *Stefanelli* v. *Minard,* 342 U. S. 117 (1951).

The motion of the respondent for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to vacate the orders which it entered subsequent to the order granting a conditional writ of habeas corpus.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

Syllabus

EASTLAND ET AL. *v.* UNITED STATES SERVICEMEN'S FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1923. Argued January 22, 1975—Decided May 27, 1975

The Senate Subcommittee on Internal Security, pursuant to its authority under a Senate resolution to make a complete study of the administration, operation, and enforcement of the Internal Security Act of 1950, began an inquiry into the various activities of respondent organization, to determine whether they were potentially harmful to the morale of United States Armed Forces. In connection with such inquiry it issued a subpoena *duces tecum* to the bank where the organization had an account, ordering the bank to produce all records involving the account. The organization and two of its members then brought an action against the Chairman, Senator Members, Chief Counsel of the Subcommittee, and the bank to enjoin implementation of the subpoena on First Amendment grounds. The District Court dismissed the action. The Court of Appeals reversed, holding that, although courts should hesitate to interfere with congressional actions even where First Amendment rights are implicated, such restraint should not preclude judicial review where no alternative avenue of relief is available, and that if the subpoena was obeyed respondents' First Amendment rights would be violated. *Held:* The activities of the Senate Subcommittee, the individual Senators, and the Chief Counsel fall within the "legitimate legislative sphere," and since it is determined that such is the case, those activities are protected by the absolute prohibition of the Speech or Debate Clause of the Constitution against being "questioned in any other Place" and hence are immune from judicial interference. Pp. 501–511.

(a) The applicability of the Clause to private civil actions is supported by the absoluteness of the term "shall not be questioned" and the sweep of the term "in any other Place." P. 503.

(b) Issuance of subpoenas such as the one in question is a legitimate use by Congress of its power to investigate, and the subpoena power may be exercised by a committee acting, as here, on behalf of one of the Houses. Pp. 503–505.

(c) Inquiry into the sources of the funds used to carry on activities suspected by a subcommittee of Congress to have a potential

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for undermining the morale of the Armed Forces is within the legitimate legislative sphere. Pp. 505–507.

(d) There is no distinction between the Subcommittee's Members and its Chief Counsel insofar as complete immunity from the issuance of the subpoena under the Speech or Debate Clause is concerned, and since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity. P. 507.

(e) The subpoena cannot be held subject to judicial questioning on the alleged ground that it works an invasion of respondents' privacy, since it is "essential to legislating." P. 508.

(f) Nor can the subpoena be held outside the protection of speech or debate immunity on the alleged ground that the motive of the investigation was improper, since in determining the legitimacy of a congressional action the motives alleged to have prompted it are not to be considered. Pp. 508–509.

(g) In view of the absolute terms of the speech or debate protection, a mere allegation that First Amendment rights may be infringed by the subpoena does not warrant judicial interference. Pp. 509–511.

159 U. S. App. D. C. 352, 488 F. 2d 1252, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and STEWART, JJ., joined, *post*, p. 513. DOUGLAS, J., filed a dissenting opinion, *post*, p. 518.

Herbert J. Miller, Jr., argued the cause for petitioners. With him on the brief were *Nathan Lewin* and *A. Raymond Randolph, Jr.*

Nancy Stearns and *Jeremiah S. Gutman* argued the cause and filed a brief for respondents.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a federal court may enjoin the issuance by Congress of a subpoena *duces tecum* that directs a bank to produce the bank records of an organization which claims a First Amend-

ment privilege status for those records on the ground that they are the equivalent of confidential membership lists. The Court of Appeals for the District of Columbia Circuit held that compliance with the subpoena "would invade the constitutional rights" of the organization, and that judicial relief is available to prevent implementation of the subpoena.

I

In early 1970 the Senate Subcommittee on Internal Security was given broad authority by the Senate to "make a complete and continuing study and investigation of . . . the administration, operation, and enforcement of the Internal Security Act of 1950 . . . ." S. Res. 341, 91st Cong., 2d Sess. (1970). The authority encompassed discovering the "extent, nature, and effect of subversive activities in the United States," and the resolution specifically directed inquiry concerning "infiltration by persons who are or may be under the domination of the foreign government . . . ." *Ibid.* See also S. Res. 366, 81st Cong., 2d Sess. (1950). Pursuant to that mandate the Subcommittee began an inquiry into the activities of respondent United States Servicemen's Fund, Inc. (USSF).

USSF describes itself as a nonprofit membership corporation supported by contributions.[1] Its stated purpose is "to further the welfare of persons who have served or are presently serving in the military." To accomplish its declared purpose USSF has engaged in various activities[2] directed at United States servicemen.

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[1] USSF is, or has been, listed with the Internal Revenue Service as a tax-exempt charitable organization.

[2] According to the complaint filed in this action USSF has helped provide civilian legal defense for military personnel, and books, newspapers, and library material on request. App. 11.

It established "coffeehouses" near domestic military installations, and aided the publication of "underground" newspapers for distribution on American military installations throughout the world. The coffeehouses were meeting places for servicemen, and the newspapers were specialized publications which USSF claims dealt with issues of concern to servicemen. Through these operations USSF attempted to communicate to servicemen its philosophy and attitudes concerning United States involvement in Southeast Asia. USSF claims the coffeehouses and newspapers became "the focus of dissent and expressions of opposition within the military toward the war in [Southeast Asia]." [3]

In the course of its investigation of USSF, the Subcommittee concluded that a prima facie showing had been made of the need for further investigation, and it resolved that appropriate subpoenas, including subpoenas *duces tecum* could be issued. Petitioner Eastland, a United States Senator, is, as he was then, Chairman of the Subcommittee. On May 28, 1970, pursuant to the above authority, he signed a subpoena *duces tecum*, issued on behalf of the Subcommittee, to the bank where USSF then had an account. The subpoena commanded the bank to produce by June 4, 1970:

> "any and all records appertaining to or involving the account or accounts of [USSF]. Such records to comprehend papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm thereof within [the bank's] control or custody or within [its] means to produce."

From the record it appears the subpoena was never actually served on the bank.[4] In any event, before the

[3] *Ibid.*

[4] The subpoena at issue here directed "Any U. S. Marshal" to serve and return, but there is no proof of service in the record. The

return date, USSF and two of its members brought this action to enjoin implementation of the subpoena *duces tecum*.

The complaint named as defendants Chairman Eastland, nine other Senators, the Chief Counsel to the Subcommittee, and the bank.[5] The complaint charged that the authorizing resolutions and the Subcommittee's actions implementing them were an unconstitutional abuse of the legislative power of inquiry, that the "sole purpose" of the Subcommittee investigation was to force "public disclosure of beliefs, opinions, expressions and associations of private citizens which may be unorthodox or unpopular," and that the "sole purpose" of the subpoena was to "harass, chill, punish and deter [USSF and its members] in their exercise of their rights and duties under the First Amendment and particularly to stifle the freedom of the press and association guaranteed by that amendment." [6] The subpoena was issued to the bank rather than to USSF and its members, the complaint claimed, "in order to deprive [them] of their rights to protect their private records, such as the sources of their contributions, as they would be entitled to do if the subpoenas had been issued against them directly." The complaint further claimed that financial support to

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Subcommittee had issued two previous subpoenas *duces tecum* to the bank, but they had been withdrawn because of procedural problems. Apparently, at least one of those subpoenas actually was served on the bank. *Id.*, at 13. The other subpoena also may have been served because the bank informed respondents of its existence. *Id.*, at 14. Respondents claim all three subpoenas are substantially identical.

[5] Apparently, at least partially because the bank was never served, Tr. of Oral Arg. 22, 46, it has not participated in the action. *Id.*, at 15, 19–20, 21–22. Therefore, as the case reaches us only the Senators and the Chief Counsel are active participants.

[6] App. 16.

USSF is obtained exclusively through contributions from private individuals, and if the bank records are disclosed "much of that financial support will be withdrawn and USSF will be unable to continue its constitutionally protected activities." [7]

For relief USSF and its members, the respondents, sought a permanent injunction restraining the Members of the Subcommittee and its Chief Counsel from trying to enforce the subpoena by contempt of Congress or other means and restraining the bank from complying with the subpoena.[8] Respondents also sought a declaratory judgment declaring the subpoena and the Senate resolutions void under the Constitution. No damages claim was made.

Since the return date on the subpoena was June 4, 1970, three days after the action was begun, enforcement of the subpoena was stayed [9] in order to avoid mootness and to prevent possible irreparable injury. The District Court then held hearings and took testimony on the matter. That court ultimately held [10] that respondents

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[7] *Id.*, at 17–18.

[8] *Id.*, at 18.

[9] On June 1, the District Court refused to enter a temporary restraining order, but on June 4 the Court of Appeals stayed enforcement of the subpoena pending expedited consideration of the matter by the District Court. The Court of Appeals reasoned that the threat of irreparable injury if the subpoena were honored, and the significance of the issues involved, necessitated "the kind of consideration and deliberation that would be provided by . . . a hearing on an application for injunction." *Id.*, at 22. One judge dissented.

[10] After the Court of Appeals stayed enforcement of the subpoena the District Court held an expedited hearing on respondents' motion for a preliminary injunction and petitioners' motion to dismiss. Afterwards the District Court denied both motions; however, the Court of Appeals again stayed enforcement of the subpoena pending further order. At that time the Court of Appeals ordered the District Court to proceed to final judgment on the merits, with a

had not made a sufficient showing of irreparable injury to warrant an injunction. The court also purported to strike a balance between the legislative interest and respondents' asserted First Amendment rights, *NAACP* v. *Alabama*, 357 U. S. 449 (1958). It concluded that a valid legislative purpose existed for the inquiry because Congress was pursuing its functions, under Art. I, § 8, of raising and supporting an army, and had a legitimate interest in "scrutiniz[ing] closely possible infiltration of subversive elements into an organization which directly affects the armed forces of this country." [11] Relying on *Barenblatt* v. *United States*, 360 U. S. 109 (1959), the District Court concluded that the legislative interest must prevail over respondents' asserted rights, and denied respondents' motions for preliminary and permanent injunctions. It also dismissed as to the petitioner Senators after concluding that the Speech or Debate Clause immunizes them from suit. *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967).

The Court of Appeals reversed, holding first that, although courts should hesitate to interfere with congressional actions even where First Amendment rights clearly are implicated, such restraint could not preclude judicial review where no alternative avenue of relief is available other than "through the equitable powers of the court." 159 U. S. App. D. C. 352, 359, 488 F. 2d 1252, 1259 (1973). Here the subpoena was directed to a third party which could not be expected to refuse

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view to consolidating any appeal from that judgment with the appeal on the denial of a preliminary injunction. The District Court then took testimony on the merits and, finally, denied respondents' motion for a permanent injunction against the subpoena. Appeal from that decision apparently was consolidated with the appeal from the denial of the preliminary injunction.

[11] *Id.*, at 31.

compliance; unless respondents could obtain judicial relief the bank might comply, the case would become moot, and the asserted violation of respondents' constitutional rights would be irreparable. Because the subpoena was not directed to respondents, the Court of Appeals noted, the traditional route for raising their defenses by refusing compliance and testing the legal issues in a contempt proceeding was not available to them. *Ansara* v. *Eastland,* 143 U. S. App. D. C. 29, 442 F. 2d 751 (1971).

Second, the Court of Appeals concluded that if the subpoena were obeyed respondents' First Amendment rights would be violated. The court said:

> "The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose has been made clear a number of times. See NAACP v. Alabama, 357 U. S. 449; Bates v. Little Rock, 361 U. S. 516; Louisiana ex rel. Gremillion v. NAACP, 366 U. S. 293 (1961); Gibson v. Florida Legislative Committee, 372 U. S. 539 (1962); Pollard v. Roberts, 393 U. S. 14 (1968), affirming the judgment of the three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968)." 159 U. S. App. D. C., at 364, 488 F. 2d, at 1264.

In this case that right would be violated, the Court of Appeals held, because discovery of the identities of donors was the admitted goal of the subpoena, *id.,* at 367, 488 F. 2d, at 1267, and that information could be gained as easily from bank records as from membership lists. Moreover, if donors' identities were revealed, or if donors reasonably feared that result, USSF's contributions would

decrease substantially, as had already occurred merely because of the threat posed by the subpoena.[12]

The Court of Appeals then fashioned a remedy to deal with the supposed violation of rights. It ordered the District Court to "consider the extent to which committee counsel should properly be required to give evidence as to matters without the 'legislative sphere.'" *Id.*, at 370, 488 F. 2d, at 1270.[13] It also ordered that the court should "be liberal in granting the right of amendment" to respondents to add other parties if thereby "the case can better proceed to a decision on the validity of the subpoena." *Ibid.* Members of Congress could be added as parties, the Court of Appeals said, if their presence is "unavoidable if a valid order is to be entered by the court to vindicate rights which would otherwise go unredressed." *Ibid.* The Court of Appeals concluded that

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[12] It appears that the District Court finding of failure to show irreparable injury was held clearly erroneous. 159 U. S. App. D. C. 352, 367, 488 F. 2d 1252, 1267 (1973). See Fed. Rule Civ. Proc. 52 (a).

[13] Respondents had made a motion in the District Court to compel petitioner Sourwine, the subcommittee counsel, to give testimony. The Senate passed a resolution, S. Res. 478, 91st Cong., 2d Sess., Oct. 13, 1970, authorizing Sourwine to testify only as to matters of public record. Respondents moved to compel further testimony from Sourwine, but the District Court denied the motion. The court ruled Sourwine's information "has been received by him pursuant to his official duties as a staff employee of the Senate . . . [and as] such, the information is within the privilege of the Senate . . . *Senate Rule 301, Senate Manual, Senate Document No. 1 of the 90th Congress, First Session.*" App. 38. The court also ruled that the Senate made a timely and appropriate invocation of its privilege. Thus information held by Sourwine was not discoverable. Fed. Rule Civ. Proc. 26 (b)(1). Respondents' appeal from this ruling was heard by the Court of Appeals with their appeals from the denial of injunctive relief. 159 U. S. App. D. C., at 358, 488 F. 2d, at 1258.

declaratory relief against Members is "preferable" to "any coercive order." *Ibid.* The clear implication is that the District Court was authorized to enter a "coercive order" which in context could mean that the Subcommittee could be prevented from pursuing its inquiry by use of a subpoena to the bank.

One judge dissented on the ground that the membership-list cases were distinguishable because in none of them was there a "showing that the lists were requested for a proper purpose." *Id.*, at 377, 488 F. 2d, at 1277. Here, on the other hand, the dissenting judge concluded, "there is a demonstrable relationship between the information sought and the valid legislative interest of the federal Congress" in discovering whether any money for USSF activities "came from foreign sources or subversive organizations," *id.*, at 377, 378, 488 F. 2d, at 1277, 1278; whether USSF activities may have constituted violations of 18 U. S. C. § 2387 (a), which prohibits interference with the loyalty, discipline, or morale of the Armed Services; or whether the anonymity of USSF donors might have disguised persons who had not complied with the Foreign Agents Registration Act of 1938, 22 U. S. C. § 611 *et seq.* Finally, he noted that the prime purpose of the Subcommittee's inquiry was to investigate application of the Internal Security Act of 1950, 50 U. S. C. § 781 *et seq.*, and that, too, provided a legitimate congressional interest.

The dissenting judge then balanced the congressional interests against private rights, *Barenblatt* v. *United States, supra; Watkins* v. *United States,* 354 U. S. 178, 198 (1957), and struck the balance in favor of the investigative role of Congress. He reasoned that there is no right to secrecy which can frustrate a legitimate congressional inquiry into an area where legislation may be had. 159 U. S. App. D. C., at 378–379, 382, 488 F. 2d, at 1278–

1279, 1282. Absent a showing that the information sought could not be used in the legislative sphere, he concluded, judicial interference was unwarranted.

We conclude that the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause of the Constitution, Art. I, § 6, cl. 1, and are therefore immune from judicial interference. We reverse.

II

The question [14] to be resolved is whether the actions of the petitioners fall within the "sphere of legitimate legislative activity." If they do, the petitioners "shall not be questioned in any other Place" about those activities since the prohibitions of the Speech or Debate Clause are absolute, *Doe* v. *McMillan*, 412 U. S. 306, 312–313 (1973); *United States* v. *Brewster*, 408 U. S. 501, 516 (1972); *Gravel* v. *United States*, 408 U. S. 606, 623 n. 14 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 502–503 (1969); *Dombrowski* v. *Eastland*, 387 U. S., at 84–85; *United States* v. *Johnson*, 383 U. S. 169, 184–185 (1966); *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959).

Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes. *Kil-*

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[14] On this record the Court of Appeals correctly held that the District Court properly entertained this action initially. 159 U. S. App. D. C., at 359–360, 488 F. 2d, at 1259–1260. The Court of Appeals saw a significant difference between a subpoena that seeks information directly from a party and one that seeks the same information from a third person. In the former case the party can resist and thereby test the subpoena; in the latter case, however, unless a court may inquire to determine whether a legitimate legislative purpose is present, *Doe* v. *McMillan*, 412 U. S. 306, 312–313 (1973); *Gravel* v. *United States*, 408 U. S. 606, 624 (1972); *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), compliance by the third person could frustrate any judicial inquiry.

bourn v. *Thompson*, 103 U. S. 168, 204 (1881); *United States* v. *Johnson*, *supra*, at 179; *Powell* v. *McCormack*, *supra*, at 502–503; *United States* v. *Brewster*, *supra*, at 508–509; *Gravel* v. *United States*, *supra*, at 617–618; cf. *Tenney* v. *Brandhove*, 341 U. S. 367, 376–378 (1951). The purpose of the Clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently.

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States* v. *Brewster*, *supra*, at 507.

In our system "the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson*, *supra*, at 178.

The Clause is a product of the English experience. *Kilbourn* v. *Thompson*, *supra*; *United States* v. *Johnson*, *supra*, at 177–179. Due to that heritage our cases make it clear that the "central role" of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States* v. *Johnson*, 383 U. S. 169, 181 (1966)," *Gravel* v. *United States*, *supra*, at 617. That role is not the sole function of the Clause, however, and English history does not totally define the reach of the Clause. Rather, it "must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government . . . ." *United States* v. *Brewster*, *supra*, at 508. Thus we have long held that, when it applies, the Clause provides protection against civil as well as criminal actions, and against actions brought by private indi-

viduals as well as those initiated by the Executive Branch. *Kilbourn* v. *Thompson, supra; Tenney* v. *Brandhove, supra; Doe* v. *McMillan, supra; Dombrowski* v. *Eastland, supra.*

The applicability of the Clause to private civil actions is supported by the absoluteness of the term "shall not be questioned," and the sweep of the term "in any other Place." In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland, supra,* at 85. Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference. *Doe* v. *McMillan,* 412 U. S., at 314.

III

In determining whether particular activities other than literal speech or debate fall within the "legitimate legislative sphere" we look to see whether the activities took place "in a session of the House by one of its members in relation to the business before it." *Kilbourn* v.

Thompson, 103 U. S., at 204. More specifically, we must determine whether the activities are

> "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel* v. *United States*, 408 U. S., at 625.

See *Doe* v. *McMillan*, *supra*, at 313.

The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain* v. *Daugherty*, 273 U. S. 135, 175 (1927). See *Anderson* v. *Dunn*, 6 Wheat. 204 (1821); *United States* v. *Rumely*, 345 U. S. 41, 46 (1953).[15] Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate. *Watkins* v. *United States*, 354 U. S., at 188.

"[W]here the legislative body does not itself possess

[15] Although the power to investigate is necessarily broad it is not unlimited. Its boundaries are defined by its source. *Watkins* v. *United States*, 354 U. S. 178, 197 (1957). Thus, "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States*, 360 U. S. 109, 111 (1959); *Sinclair* v. *United States*, 279 U. S. 263, 291–292 (1929). We have made it clear, however, that Congress is not invested with a " 'general' power to inquire into private affairs." *McGrain* v. *Daugherty*, 273 U. S. 135, 173 (1927). The subject of any inquiry always must be one "on which legislation could be had." *Id.*, at 177.

> the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed." *McGrain* v. *Daugherty, supra,* at 175.

It also has been held that the subpoena power may be exercised by a committee acting, as here, on behalf of one of the Houses. *Id.,* at 158. Cf. *Tenney* v. *Brandhove,* 341 U. S., at 377–378. Without such power the Subcommittee may not be able to do the task assigned to it by Congress. To conclude that the power of inquiry is other than an integral part of the legislative process would be a miserly reading of the Speech or Debate Clause in derogation of the "integrity of the legislative process." *United States* v. *Brewster,* 408 U. S., at 524; and *United States* v. *Johnson,* 383 U. S., at 172.

We have already held that the act "of authorizing an investigation pursuant to which . . . materials were gathered" is an integral part of the legislative process. *Doe* v. *McMillan,* 412 U. S., at 313. The issuance of a subpoena pursuant to an authorized investigation is similarly an indispensable ingredient of lawmaking; without it our recognition that the act "of authorizing" is protected would be meaningless. To hold that Members of Congress are protected for authorizing an investigation, but not for issuing a subpoena in exercise of that authorization, would be a contradiction denigrating the power granted to Congress in Art. I and would indirectly impair the deliberations of Congress. *Gravel, supra,* at 625.

The particular investigation at issue here is related to and in furtherance of a legitimate task of Congress.

Watkins v. *United States,* 354 U. S., at 187. On this record the pleadings show that the actions of the Members and the Chief Counsel fall within the "sphere of legitimate legislative activity." The Subcommittee was acting under an unambiguous resolution from the Senate authorizing it to make a complete study of the "administration, operation, and enforcement of the Internal Security Act of 1950 . . . ." S. Res. 341, 91st Cong., 2d Sess. (1970). That grant of authority is sufficient to show that the investigation upon which the Subcommittee had embarked concerned a subject on which "legislation could be had." *McGrain* v. *Daugherty,* 273 U. S., at 177; see *Communist Party* v. *Control Board,* 367 U. S. 1 (1961).

The propriety of making USSF a subject of the investigation and subpoena is a subject on which the scope of our inquiry is narrow. *Hutcheson* v. *United States,* 369 U. S. 599, 618–619 (1962). See *Sinclair* v. *United States,* 279 U. S. 263, 294–295 (1929). "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Tenney* v. *Brandhove, supra,* at 378. Cf. *Doe* v. *McMillan,* 412 U. S., at 316 n. 10. Even the most cursory look at the facts presented by the pleadings reveals the legitimacy of the USSF subpoena. Inquiry into the sources of funds used to carry on activities suspected by a subcommittee of Congress to have a potential for undermining the morale of the Armed Forces is within the legitimate legislative sphere. Indeed, the complaint here tells us that USSF operated on or near military and naval bases, and that its facilities became the "focus of dissent" to declared national policy. Whether USSF activities violated any statute is not relevant; the inquiry was intended to inform Congress in an area where legislation may be had. USSF asserted it

does not know the sources of its funds; in light of the Senate authorization to the Subcommittee to investigate "infiltration by persons who are or may be under the domination of . . . foreign government," *supra,* at 493, and in view of the pleaded facts, it is clear that the subpoena to discover USSF's bank records "may fairly be deemed within [the Subcommittee's] province." *Tenney* v. *Brandhove, supra,* at 378.

We conclude that the Speech or Debate Clause provides complete immunity for the Members for issuance of this subpoena. We draw no distinction between the Members and the Chief Counsel. In *Gravel, supra,* we made it clear that "the day-to-day work of such aides is so critical to the Members' performance that they must be treated as [the Members'] alter egos . . . ." 408 U. S., at 616–617. See also *id.,* at 621. Here the complaint alleges that the "Subcommittee members and staff caused the . . . subpoena to be issued . . . under the authority of Senate Resolution 366 . . . ." The complaint thus does not distinguish between the activities of the Members and those of the Chief Counsel. Contrast, *Dombrowski* v. *Eastland,* 387 U. S., at 84. Since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity. *Gravel* v. *United States,* 408 U. S., at 621; *Doe* v. *McMillan,* 412 U. S., at 317.

IV

Respondents rely on language in *Gravel* v. *United States, supra,* at 621:

> "[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded

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> the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances."

From this respondents argue that the subpoena works an invasion of their privacy, and thus cannot be immune from judicial questioning. The conclusion is unwarranted. The quoted language from *Gravel* referred to actions which were *not* "essential to legislating." *Ibid.* See *United States* v. *Johnson*, 383 U. S. 169 (1966). For example, the arrest by the Sergeant at Arms was held unprotected in *Kilbourn* v. *Thompson*, *supra*, because it was not "essential to legislating." See *Marshall* v. *Gordon*, 243 U. S. 521, 537 (1917). Quite the contrary is the case with a routine subpoena intended to gather information about a subject on which legislation may be had. See *Quinn* v. *United States*, 349 U. S. 155, 161 (1955).

Respondents also contend that the subpoena cannot be protected by the speech or debate immunity because the "sole purpose" of the investigation is to force "public disclosure of beliefs, opinions, expressions and associations of private citizens which may be unorthodox or unpopular." App. 16. Respondents view the scope of the privilege too narrowly. Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it. *Watkins* v. *United States*, 354 U. S., at 200; *Hutcheson* v. *United States*, 369 U. S., at 614. In *Brewster*, we said that "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process *and into the motivation for those acts.*" 408 U. S., at 525 (emphasis added). And in *Tenney* v. *Brandhove* we said that "[t]he claim of an unworthy purpose does not destroy the privilege." 341 U. S., at 377. If the mere allegation that a valid legis-

lative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed." *Id.*, at 378. The wisdom of congressional approach or methodology is not open to judicial veto. *Doe* v. *McMillan*, 412 U. S., at 313. Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function—like any research—is that it takes the searchers up some "blind alleys" and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result.

Finally, respondents argue that the purpose of the subpoena was to "harass, chill, punish and deter" them in the exercise of their First Amendment rights, App. 16, and thus that the subpoena cannot be protected by the Clause. Their theory seems to be that once it is alleged that First Amendment rights may be infringed by congressional action the Judiciary may intervene to protect those rights; the Court of Appeals seems to have subscribed to that theory. That approach, however, ignores the absolute nature of the speech or debate protection [16]

[16] In some situations we have balanced First Amendment rights against public interests, *Watkins* v. *United States*, 354 U. S. 178 (1957); *Barenblatt* v. *United States*, 360 U. S. 109 (1959), but those cases did not involve attempts by private parties to impede congressional action where the Speech or Debate Clause was raised by Congress by way of defense. Cf. *United States* v. *Rumely*, 345 U. S. 41, 46 (1953). The cases were criminal prosecutions where defendants sought to justify their refusals to answer congressional inquiries by asserting their First Amendment rights. Different problems were presented from those here. Any interference with congressional action had already occurred when the cases reached us, and Congress was seeking the aid of the Judiciary to enforce its will. Our task was to perform the judicial function in criminal prosecu-

and our cases which have broadly construed that protection.

> "Congressmen and their aides are immune from liability for their actions within the 'legislative sphere,' *Gravel* v. *United States, supra,* at 624–625, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes." *Doe* v. *McMillan,* 412 U. S., at 312–313.

For us to read the Clause as respondents suggest would create an exception not warranted by the language, purposes, or history of the Clause. Respondents make the familiar argument that the broad protection granted by the Clause creates a potential for abuse. That is correct, and in *Brewster, supra,* we noted that the risk of such abuse was "the conscious choice of the Framers" buttressed and justified by history. 408 U. S., at 516. Our consistently broad construction of the Speech or

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tions, and we properly scrutinized the predicates of the criminal prosecutions. *Watkins, supra,* at 208; *Flaxer* v. *United States,* 358 U. S. 147, 151 (1958); *Quinn* v. *United States,* 349 U. S. 155, 162, 169 (1955); *Hutcheson* v. *United States,* 369 U. S. 599, 630–631 (1962) (Warren, C. J., dissenting); 640 (DOUGLAS, J., dissenting). As Mr. Justice Frankfurter said concurring in *Watkins:*

"By . . . making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which courts function." 354 U. S., at 216.

Where we are presented with an attempt to interfere with an ongoing activity by Congress, and that activity is found to be within the legitimate legislative sphere, balancing plays no part. The speech or debate protection provides an absolute immunity from judicial interference. Collateral harm which may occur in the course of a legitimate legislative inquiry does not allow us to force the inquiry to "grind to a halt." *Hutcheson* v. *United States, supra,* at 618.

Debate Clause rests on the belief that it must be so construed to provide the independence which is its central purpose.

This case illustrates vividly the harm that judicial interference may cause. A legislative inquiry has been frustrated for nearly five years, during which the Members and their aide have been obliged to devote time to consultation with their counsel concerning the litigation, and have been distracted from the purpose of their inquiry. The Clause was written to prevent the need to be confronted by such "questioning" and to forbid invocation of judicial power to challenge the wisdom of Congress' use of its investigative authority.[17]

V

When the Senate case was in the Court of Appeals it was consolidated with three other cases [18] because it was assumed that "a decision in [the Senate] case might well control the disposition of [the others]." Those cases

[17] Although the Speech or Debate Clause has never been read so broadly that legislators are "absolved of the responsibility of filing a motion to dismiss," *Powell* v. *McCormack*, 395 U. S. 486, 505 n. 25 (1969); see *Tenney* v. *Brandhove*, 341 U. S., at 376–377, the purposes which the Clause serves require that such motions be given the most expeditious treatment by district courts because one branch of Government is being asked to halt the functions of a coordinate branch. If there is a dismissal and an appeal, courts of appeals have a duty to see that the litigation is swiftly resolved. Enforcement of the Subcommittee's subpoena has been restrained since June 1970, nearly five years, while this litigation dragged through the courts. This protracted delay has frustrated a valid congressional inquiry.

[18] *Progressive Labor Party* v. *Committee on Internal Security of the U. S. House of Representatives* (C. A. No. 71–1609); *National Peace Action Coalition* v. *Committee on Internal Security of the U. S. House of Representatives* (C. A. No. 71–1693); *Peoples Coalition for Peace and Justice* v. *Committee on Internal Security of the U. S. House of Representatives* (C. A. No. 71–1717).

involved subpoenas from the House Internal Security Committee to banks for the bank records of certain organizations. As in the Senate aspect of this case, the organizations whose bank records were sought sued, alleging that if the subpoenas were honored their constitutional rights would be violated. The issue of speech or debate protection for Members and aides is presented in all the cases consolidated in the Court of Appeals. However, the complaints in the House cases are different from the complaint in the Senate case, additional parties are involved, and consequently additional issues may be presented.

Progress in the House cases was suspended when they were in the pleading stage awaiting the outcome of the Senate aspect of this case. The issues in them, therefore, have not been joined. Additionally, it appears that the Session in which the House subpoenas were issued has expired. Since the House, unlike the Senate, is not a continuing body, *McGrain* v. *Daugherty*, 273 U. S., at 181; *Gojack* v. *United States*, 384 U. S. 702, 706–707, n. 4 (1966), a question of mootness may be raised. Moreover it appears that the Committee that issued the subpoenas has been abolished by the House, H. Res. 5, 94th Cong., 1st Sess., Jan. 14, 1975. In view of these problems, and because the House aspects of this case were not briefed or argued here, we conclude it would be unwise to attempt to decide any issues they might present that are not resolved in the Senate aspect of this case. *Powell* v. *McCormack*, 395 U. S., at 496 n. 8; *id.*, at 559 (STEWART, J., dissenting).

Judgment with respect to the Senate aspect of this case is reversed and the case is remanded to the Court of Appeals for entry of a judgment directing the District Court to dismiss the complaint. The House aspects of this case are remanded with directions to remand to

the District Court for further consideration consistent with this opinion.

Reversed and remanded.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, concurring in the judgment.

I agree with the Court that the Speech or Debate Clause protects the actions of the Senate petitioners in this case from judicial interference, and that the House aspects of this case should be reconsidered by the District Court. As our cases have consistently held, however, the Speech or Debate Clause protects legislators and their confidential aides from suit; it does not immunize congressional action from judicial review. I write today only to emphasize that the Speech or Debate Clause does not entirely immunize a congressional subpoena from challenge by a party not in a position to assert his constitutional rights by refusing to comply with it.

I

When the Senate Subcommittee on Internal Security subpoenaed the records of the bank account of respondent USSF (hereinafter respondent), respondent brought this suit in the District of Columbia against the Members of the Subcommittee, its counsel, and the bank to declare invalid and restrain enforcement of the subpoena. Suit was brought in the District of Columbia because the Court of Appeals for the Second Circuit had held one week before in a suit against the same Subcommittee and its counsel that jurisdiction and venue lay only in the District of Columbia. *Liberation News Service* v. *Eastland*, 426 F. 2d 1379 (1970). Having sued in the District of Columbia, however, respondent found that it could not get proper service on the New York

bank. Consequently, the only parties that it brought before the courts were the Senators and their counsel.

As the Court points out, the District Court properly entertained the action in order to provide a forum in which respondent could assert its constitutional objections to the subpoena, since a neutral third party could not be expected to resist the subpoena by placing itself in contempt. *Ante*, at 501 n. 14; see *Perlman* v. *United States*, 247 U. S. 7, 12 (1918); *United States* v. *Doe*, 455 F. 2d 753, 756–757 (CA1), vacated *sub nom. Gravel* v. *United States*, 408 U. S. 606 (1972); see also *United States* v. *Nixon*, 418 U. S. 683, 691 (1974). But a court's inquiry in such a setting is necessarily quite limited once defendants entitled to do so invoke the privilege of the Speech or Debate Clause, as was done here. If the Senators' actions were within the "legitimate legislative sphere," the matter ends there and they are answerable no further to the court. If their counsel's actions were in aid of that activity, then as a confidential employee of the Members, he is equally shielded from further judicial interference. Compare *Gravel* v. *United States*, *supra*, at 616–622, with *Doe* v. *McMillan*, 412 U. S. 306, 314–316 (1973).[1]

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[1] *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967), was a damages action against the same Chairman and Counsel Sourwine of the Senate Subcommittee on Internal Security, based on allegations of a conspiracy with state officials to violate the plaintiff's Fourth Amendment rights. The Court distinguished between the Senator and counsel, remanding only the case involving the latter for trial because there was disputed evidence in the record giving "more than merely colorable substance" to the claims against him, *id.*, at 84; the record contained no evidence of the Senator's involvement in any activity that could give rise to liability. The Court noted that the doctrine of immunity for acts within the legislative sphere is "less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." *Id.*, at 85. In the present case, where counsel is alleged

The Court applies this well-settled doctrine to the present case and holds that since the issuance of the subpoena fell within the sphere of legitimate legislative activity, the proceedings against the petitioners must come to an end. I do not read the Court to suggest, however, nor could I agree, that the constitutionality of a congressional subpoena is always shielded from more searching judicial inquiry. For, as the very cases on which the Court relies demonstrate, the protection of the Speech or Debate Clause is personal. It extends to Members and their counsel acting in a legislative capacity; it does not preclude judicial review of their decisions in an appropriate case, whether they take the form of legislation or a subpoena.

II

Modern legislatures, and particularly the Congress, may legislate on a wide range of subjects. In order to discharge this function, and their related informing function, they may genuinely need a great deal of information in the exclusive possession of persons who would not make it available except under the compulsion of a subpoena. When duly subpoenaed, however, such a person does not shed his constitutional right to withhold certain classes of information. If he refuses to testify or to produce documents and invokes a pertinent privilege, he still runs the risk that the legislature will cite him for contempt.[2] At trial he may defend on the basis of the constitutional right to withhold information from the legislature, and his right will be respected

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only to have joined with the Senators in causing the subpoena to be issued, we have no occasion to distinguish between Mr. Sourwine and the Senators.

[2] In the federal system, this is done by the appropriate chamber referring the matter to the United States Attorney for presentation to a grand jury, indictment, and trial in the federal courts. See 2 U. S. C. §§ 192–194.

along with the legitimate needs of the legislature. As the Court said in *Watkins* v. *United States*, 354 U. S. 178, 188 (1957):

> "The Bill of Rights is applicable to [congressional] investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged."

Accord, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); see *Quinn* v. *United States*, 349 U. S. 155, 161 (1955); Reinstein & Silverglate, Legislative Privilege and the Separation of Powers, 86 Harv. L. Rev. 1113, 1173–1176 (1973).

The Speech or Debate Clause cannot be used to avoid meaningful review of constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases arising under the Speech or Debate Clause indicate only that a Member of Congress or his aide may not be called upon to defend a subpoena against constitutional objection, and not that the objection will not be heard at all.

The privilege of the Speech or Debate Clause extends to Members of Congress when their action is "essential to legislating," in order to assure the independence of the legislators and their freedom from vexatious and distracting litigation. See *United States* v. *Johnson*, 383 U. S. 169, 180–182 (1966); *United States* v. *Brewster*, 408 U. S. 501, 512 (1972). Further, "a Member and his aide are to be 'treated as one' " under the Clause, "insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel* v. *United States*, 408 U. S., at 616, 618. At the same time, however, the Speech or Debate Clause does not insulate

legislative functionaries carrying out nonlegislative tasks. *Doe* v. *McMillan*, 412 U. S., at 315.

Kilbourn v. *Thompson*, 103 U. S. 168 (1881), was an action to recover damages for false imprisonment. The Court held that the Speech or Debate Clause afforded the defendant Members of Congress a good defense since they had taken no part in Kilbourn's arrest other than to vote that the Sergeant at Arms accomplish it. The Sergeant at Arms, however, was held to answer for carrying out their unconstitutional directive; and Kilbourn later recovered $20,000 from him. See *Kilbourn* v. *Thompson*, MacArth. & M. 401, 432 (Sup. Ct. D. C. 1883). The basis for the Court's holding was not, however, as the Court seems at one point to suggest, *ante*, at 508, that the arrest was inessential to legislating. We have already twice observed that the "resolution authorizing Kilbourn's arrest . . . was clearly legislative in nature. *But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there.* That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel*, *supra*, at 618 (emphasis added); *Doe* v. *McMillan*, *supra*, at 315 n. 9.

III

This case does not present the questions of what would be the proper procedure, and who might be the proper parties defendant, in an effort to get before a court a constitutional challenge to a subpoena *duces tecum* issued to a third party.[3] As respondent's counsel conceded at oral argument, this case is at an end if the Senate peti-

[3] See the opinion below, 159 U. S. App. D. C. 352, 370, 488 F. 2d 1252, 1270 (1973); *Liberation News Service* v. *Eastland*, 426 F. 2d 1379, 1384 n. 10 (CA2 1970); cf. *Stamler* v. *Willis*, 415 F. 2d 1365, 1369 (CA7 1969).

tioners are upheld in their claim of immunity, as they must be.[4]

MR. JUSTICE DOUGLAS, dissenting.

I would affirm the judgment below.

The basic issues in this case were canvassed by me in *Tenney* v. *Brandhove*, 341 U. S. 367, 381–383 (1951) (dissenting opinion), and by the Court in *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967), in an opinion which I joined. Under our federal regime that delegates, by the Constitution and Acts of Congress, awesome powers to individuals, those powers may not be used to deprive people of their First Amendment or other constitutional rights. It is my view that no official, no matter how high or majestic his or her office, who is within the reach of judicial process, may invoke immunity for his actions for which wrongdoers normally suffer. There may be few occasions when, on the merits, it would be appropriate to invoke such a remedy. But no regime of law that can rightfully claim that name may make trustees of these vast powers immune from actions brought by people who have been wronged by official action. See *Watkins* v. *United States*, 354 U. S. 178, 198 (1957).

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[4] In the House aspects of this case, where the banks to which the subpoenas were directed are within the jurisdiction of the District Court, this would not necessarily be true if that court were to determine that the issues are not moot.

Syllabus

BREED, DIRECTOR, CALIFORNIA YOUTH AUTHORITY *v.* JONES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73-1995. Argued February 25-26, 1975—Decided May 27, 1975

The prosecution of respondent as an adult in California Superior Court, after an adjudicatory finding in Juvenile Court that he had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. Pp. 528-541.

(a) Respondent was put in jeopardy at the Juvenile Court adjudicatory hearing, whose object was to determine whether he had committed acts that violated a criminal law and whose potential consequences included both the stigma inherent in that determination and the deprivation of liberty for many years. Jeopardy attached when the Juvenile Court, as the trier of the facts, began to hear evidence. Pp. 528-531.

(b) Contrary to petitioner's contention, respondent's trial in Superior Court for the same offense as that for which he had been tried in Juvenile Court, violated the policies of the Double Jeopardy Clause, even if respondent "never faced the risk of more than one punishment," since the Clause "is written in terms of potential or risk of *trial* and conviction, not punishment." *Price* v. *Georgia*, 398 U. S. 323, 329. Respondent was subjected to the burden of two trials for the same offense; he was twice put to the task of marshaling his resources against those of the State, twice subjected to the "heavy personal strain" that such an experience represents. Pp. 532-533.

(c) If there is to be an exception to the constitutional protection against a second trial in the context of the juvenile-court system, it must be justified by interests of society, reflected in that unique institution, or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens that the exception will entail in individual cases. Pp. 533-534.

(d) Giving respondent the constitutional protection against multiple trials in this context will not, as petitioner claims, diminish the flexibility and informality of juvenile-court pro-

ceedings to the extent that those qualities relate uniquely to the goals of the juvenile-court system. A requirement that transfer hearings be held prior to adjudicatory hearings does not alter the nature of the latter proceedings. More significantly, such a requirement need not affect the quality of decisionmaking at transfer hearings themselves. The burdens petitioner envisions would not pose a significant problem for the administration of the juvenile-court system, and quite apart from that consideration, transfer hearings prior to adjudication will aid the objectives of that system. Pp. 535–541.

497 F. 2d 1160, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Russel Iungerich, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *S. Clark Moore*, Assistant Attorney General, and *Kent L. Richland*, Deputy Attorney General.

Robert L. Walker argued the cause for respondent. With him on the brief was *Peter Bull*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the prosecution of respondent as an adult, after Juvenile Court proceedings which resulted in a finding that respondent had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the Fifth and Fourteenth Amendments to the United States Constitution.

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*Briefs of *amici curiae* urging affirmance were filed by *Alfred L. Scanlan* for the National Council of Juvenile Court Judges; by *David Gilman* for the National Council on Crime and Delinquency et al.; and by *Richard S. Buckley* and *Laurance S. Smith* for the California Public Defenders Assn.

On February 9, 1971, a petition was filed in the Superior Court of California, County of Los Angeles, Juvenile Court, alleging that respondent, then 17 years of age, was a person described by Cal. Welf. & Inst'ns Code § 602 (1966),[1] in that, on or about February 8, while armed with a deadly weapon, he had committed acts which, if committed by an adult, would constitute the crime of robbery in violation of Cal. Penal Code § 211 (1970). The following day, a detention hearing was held, at the conclusion of which respondent was ordered detained pending a hearing on the petition.[2]

The jurisdictional or adjudicatory hearing was conducted on March 1, pursuant to Cal. Welf. & Inst'ns Code § 701 (1966).[3] After taking testimony from two

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[1] As of the date of filing of the petition in this case, Cal. Welf. & Inst'ns Code § 602 (1966) provided:

"Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

An amendment in 1971, not relevant here, lowered the jurisdictional age from 21 to 18. 1971 Cal. Stats. 3766, c. 1748, § 66.

[2] See Cal. Welf. & Inst'ns Code §§ 632, 635, 636 (1966). The probation officer was required to present a prima facie case that respondent had committed the offense alleged in the petition. *In re William M.*, 3 Cal. 3d 16, 473 P. 2d 737 (1970). Respondent was represented by court-appointed counsel at the detention hearing and thereafter.

[3] At the time of the hearing, Cal. Welf. & Inst'ns Code § 701 (1966) provided:

"At the hearing, the court shall first consider only the question whether the minor is a person described by Sections 600, 601, or 602, and for this purpose, any matter or information relevant and material to the circumstances or acts which are alleged to bring him within the jurisdiction of the juvenile court is admissible and may

prosecution witnesses and respondent, the Juvenile Court found that the allegations in the petition were true and that respondent was a person described by § 602, and it sustained the petition. The proceedings were continued for a dispositional hearing,[4] pending which the court ordered that respondent remain detained.

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be received in evidence; however, *a preponderance of evidence*, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602, and a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Sections 600 or 601. When it appears that the minor has made an extrajudicial admission or confession and denies the same at the hearing, the court may continue the hearing for not to exceed seven days to enable the probation officer to subpoena witnesses to attend the hearing to prove the allegations of the petition. If the minor is not represented by counsel at the hearing, it shall be deemed that objections that could have been made to the evidence were made." (Emphasis added.)

A 1971 amendment substituted "proof beyond a reasonable doubt supported by evidence" for the language in italics. 1971 Cal. Stats. 1832, c. 934, § 1. Respondent does not claim that the standard of proof at the hearing failed to satisfy due process. See *In re Winship*, 397 U. S. 358 (1970); *DeBacker* v. *Brainard*, 396 U. S. 28, 31 (1969).

Hereafter, the § 701 hearing will be referred to as the adjudicatory hearing.

[4] At the time, Cal. Welf. & Inst'ns Code § 702 (Supp. 1968) provided:

"After hearing such evidence, the court shall make a finding, noted in the minutes of the court, whether or not the minor is a person described by Sections 600, 601, or 602. If it finds that the minor is not such a person, it shall order that the petition be dismissed and the minor be discharged from any detention or restriction theretofore ordered. If the court finds that the minor is such a person, it shall make and enter its findings and order accordingly and shall then proceed to hear evidence on the question of the proper disposition to be made of the minor. Prior to doing so, it may continue the hearing, if necessary, to receive the social study of the probation officer or to receive other evidence on its own motion or the mo-

At a hearing conducted on March 15, the Juvenile Court indicated its intention to find respondent "not . . . amenable to the care, treatment and training program available through the facilities of the juvenile court" under Cal. Welf. & Inst'ns Code § 707 (Supp. 1967).[5] Respondent's counsel orally moved "to continue the

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tion of a parent or guardian for not to exceed 10 judicial days if the minor is detained during such continuance, and if the minor is not detained, it may continue the hearing to a date not later than 30 days after the date of filing of the petition. The court may, for good cause shown continue the hearing for an additional 15 days, if the minor is not detained. The court may make such order for detention of the minor or his release from detention, during the period of the continuance, as is appropriate."

[5] At the time, Cal. Welf. & Inst'ns Code § 707 (Supp. 1967) provided:

"At any time during a hearing upon a petition alleging that a minor is, by reason of violation of any criminal statute or ordinance, a person described in Section 602, when substantial evidence has been adduced to support a finding that the minor was 16 years of age or older at the time of the alleged commission of such offense and that the minor would not be amenable to the care, treatment and training program available through the facilities of the juvenile court, or if, at any time after such hearing, a minor who was 16 years of age or older at the time of the commission of an offense and who was committed therefor by the court to the Youth Authority, is returned to the court by the Youth Authority pursuant to Section 780 or 1737.1, the court may make a finding noted in the minutes of the court that the minor is not a fit and proper subject to be dealt with under this chapter, and the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance and thereafter dismiss the petition or, if a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are held, shall dismiss the petition and issue its order directing that the other court proceedings resume.

"In determining whether the minor is a fit and proper subject to be dealt with under this chapter, the offense, in itself, shall not be sufficient to support a finding that such minor is not a fit and

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matter on the ground of surprise," contending that respondent "was not informed that it was going to be a fitness hearing." The court continued the matter for one week, at which time, having considered the report of the probation officer assigned to the case and having heard her testimony, it declared respondent "unfit for treatment as a juvenile," [6] and ordered that he be prosecuted as an adult.[7]

Thereafter, respondent filed a petition for a writ of habeas corpus in Juvenile Court, raising the same double jeopardy claim now presented. Upon the denial of that petition, respondent sought habeas corpus relief in the California Court of Appeal, Second Appellate District. Although it initially stayed the criminal prosecution pending against respondent, that court denied the petition. *In re Gary J.*, 17 Cal. App. 3d 704, 95 Cal.

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proper subject to be dealt with under the provisions of the Juvenile Court Law.

"A denial by the person on whose behalf the petition is brought of any or all of the facts or conclusions set forth therein or of any inference to be drawn therefrom is not, of itself, sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law.

"The court shall cause the probation officer to investigate and submit a report on the behavioral patterns of the person being considered for unfitness."

[6] The Juvenile Court noted:

"This record I have read is one of the most threatening records I have read about any Minor who has come before me.

"We have, as a matter of simple fact, no less than three armed robberies, each with a loaded weapon. The degree of delinquency which that represents, the degree of sophistication which that represents and the degree of impossibility of assistance as a juvenile which that represents, I think is overwhelming . . . ." App. 33.

[7] In doing so, the Juvenile Court implicitly rejected respondent's double jeopardy argument, made at both the original § 702 hearing and in a memorandum submitted by counsel prior to the resumption of that hearing after the continuance.

Rptr. 185 (1971). The Supreme Court of California denied respondent's petition for hearing.

After a preliminary hearing respondent was ordered held for trial in Superior Court, where an information was subsequently filed accusing him of having committed robbery, in violation of Cal. Penal Code § 211 (1970), while armed with a deadly weapon, on or about February 8, 1971. Respondent entered a plea of not guilty, and he also pleaded that he had "already been placed once in jeopardy and convicted of the offense charged, by the judgment of the Superior Court of the County of Los Angeles, Juvenile Court, rendered . . . on the 1st day of March, 1971." App. 47. By stipulation, the case was submitted to the court on the transcript of the preliminary hearing. The court found respondent guilty of robbery in the first degree under Cal. Penal Code § 211a (1970) and ordered that he be committed to the California Youth Authority.[8] No appeal was taken from the judgment of conviction.

On December 10, 1971, respondent, through his mother as guardian *ad litem*, filed the instant petition for a writ of habeas corpus in the United States District Court for the Central District of California. In his petition he alleged that his transfer to adult court pursuant to Cal. Welf. & Inst'ns Code § 707 and subsequent trial there

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[8] The authority for the order of commitment derived from Cal. Welf. & Inst'ns Code § 1731.5 (Supp. 1971). At the time of the order, Cal. Welf. & Inst'ns Code § 1771 (1966) provided:

"Every person convicted of a felony and committed to the authority shall be discharged when such person reaches his 25th birthday, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) or unless a petition is filed under Article 5 of this chapter. In the event such a petition under Article 5 is filed, the authority shall retain control until the final disposition of the proceeding under Article 5."

"placed him in double jeopardy." App. 13. The District Court denied the petition, rejecting respondent's contention that jeopardy attached at his adjudicatory hearing. It concluded that the "distinctions between the preliminary procedures and hearings provided by California law for juveniles and a criminal trial are many and apparent and the effort of [respondent] to relate them is unconvincing," and that "even assuming jeopardy attached during the preliminary juvenile proceedings . . . it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court." 343 F. Supp. 690, 692 (1972).

The Court of Appeals reversed, concluding that applying double jeopardy protection to juvenile proceedings would not "impede the juvenile courts in carrying out their basic goal of rehabilitating the erring youth," and that the contrary result might "do irreparable harm to or destroy their confidence in our judicial system." The court therefore held that the Double Jeopardy Clause "is fully applicable to juvenile court proceedings." 497 F. 2d 1160, 1165 (CA9 1974).

Turning to the question whether there had been a constitutional violation in this case, the Court of Appeals pointed to the power of the Juvenile Court to "impose severe restrictions upon the juvenile's liberty," *ibid.*, in support of its conclusion that jeopardy attached in respondent's adjudicatory hearing.[9] It rejected petitioner's contention that no new jeopardy attached when respondent was referred to Superior Court and subsequently tried and convicted, finding "continuing jeopardy" principles

[9] In reaching this conclusion, the Court of Appeals also relied on *Fain* v. *Duff*, 488 F. 2d 218 (CA5 1973), cert. pending, No. 73–1768, and *Richard M.* v. *Superior Court*, 4 Cal. 3d 370, 482 P. 2d 664 (1971), and it noted that "California concedes that jeopardy attaches when the juvenile is adjudicated a ward of the court." 497 F. 2d, at 1166.

advanced by petitioner inapplicable. Finally, the Court of Appeals observed that acceptance of petitioner's position would "allow the prosecution to review in advance the accused's defense and, as here, hear him testify about the crime charged," a procedure it found offensive to "our concepts of basic, even-handed fairness." The court therefore held that once jeopardy attached at the adjudicatory hearing, a minor could not be retried as an adult or a juvenile "absent some exception to the double jeopardy prohibition," and that there "was none here." *Id.*, at 1168.

We granted certiorari because of a conflict between Courts of Appeals and the highest courts of a number of States on the issue presented in this case and similar issues and because of the importance of final resolution of the issue to the administration of the juvenile-court system.

I

The parties agree that, following his transfer from Juvenile Court, and as a defendant to a felony information, respondent was entitled to the full protection of the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. See *Benton* v. *Maryland*, 395 U. S. 784 (1969). In addition, they agree that respondent was put in jeopardy by the proceedings on that information, which resulted in an adjudication that he was guilty of robbery in the first degree and in a sentence of commitment. Finally, there is no dispute that the petition filed in Juvenile Court and the information filed in Superior Court related to the "same offence" within the meaning of the constitutional prohibition. The point of disagreement between the parties, and the question for our decision, is whether, by reason of the proceedings in Juvenile Court, respondent was "twice put in jeopardy."

II

Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. See *Price* v. *Georgia*, 398 U. S. 323, 326, 329 (1970); *Serfass* v. *United States*, 420 U. S. 377, 387–389 (1975). Although the constitutional language, "jeopardy of life or limb," suggests proceedings in which only the most serious penalties can be imposed, the Clause has long been construed to mean something far broader than its literal language. See *Ex parte Lange*, 18 Wall. 163, 170–173 (1874).[10] At the same time, however, we have held that the risk to which the Clause refers is not present in proceedings that are not "essentially criminal." *Helvering* v. *Mitchell*, 303 U. S. 391, 398 (1938). See *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943); *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972). See also J. Sigler, Double Jeopardy 60–62 (1969).

Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with tradi-

[10] Distinctions which in other contexts have proved determinative of the constitutional rights of those charged with offenses against public order have not similarly confined the protection of the Double Jeopardy Clause. Compare *Robinson* v. *Neil*, 409 U. S. 505 (1973), with *Baldwin* v. *New York*, 399 U. S. 66 (1970), and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972). For the details of Robinson's trial for violating a city ordinance, see *Robinson* v. *Henderson*, 268 F. Supp. 349 (ED Tenn. 1967), aff'd, 391 F. 2d 933 (CA6 1968).

tional criminal prosecutions. *In re Gault,* 387 U. S. 1 (1967); *In re Winship,* 397 U. S. 358 (1970). In so doing the Court has evinced awareness of the threat which such a process represents to the efforts of the juvenile-court system, functioning in a unique manner, to ameliorate the harshness of criminal justice when applied to youthful offenders. That the system has fallen short of the high expectations of its sponsors in no way detracts from the broad social benefits sought or from those benefits that can survive constitutional scrutiny.

We believe it is simply too late in the day to conclude, as did the District Court in this case, that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years.[11] For it is clear under our cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew "the 'civil' label-of-convenience which has been attached to juvenile proceedings," *In re Gault, supra,* at 50, and that "the juvenile process . . . be candidly appraised." 387 U. S., at 21. See *In re Winship, supra,* at 365–366.

As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." *United States ex rel. Marcus* v. *Hess, supra,* at 548–549. Because of its purpose and potential consequences, and the nature and resources of the State,

[11] At the time of respondent's dispositional hearing, permissible dispositions included commitment to the California Youth Authority until he reached the age of 21 years. See Cal. Welf. & Inst'ns Code §§ 607, 731 (1966). Petitioner has conceded that the "adjudicatory hearing is, in every sense, a court trial." Tr. of Oral Arg. 4.

such a proceeding imposes heavy pressures and burdens—psychological, physical, and financial—on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to the experience only once "for the same offence." See *Green* v. *United States*, 355 U. S. 184, 187 (1957); *Price* v. *Georgia*, 398 U. S., at 331; *United States* v. *Jorn*, 400 U. S. 470, 479 (1971) (opinion of Harlan, J.).

In *In re Gault*, *supra*, at 36, this Court concluded that, for purposes of the right to counsel, a "proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." See *In re Winship*, *supra*, at 366. The Court stated that the term "delinquent" had "come to involve only slightly less stigma than the term 'criminal' applied to adults," *In re Gault*, *supra*, at 24; see *In re Winship*, *supra*, at 367, and that, for purposes of the privilege against self-incrimination, "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *In re Gault*, *supra*, at 50. See 387 U. S., at 27; *In re Winship*, *supra*, at 367.[12]

Thus, in terms of potential consequences, there is little to distinguish an adjudicatory hearing such as was held in this case from a traditional criminal prosecution. For that reason, it engenders elements of "anxiety and insecu-

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[12] Nor does the fact "that the purpose of the commitment is rehabilitative and not punitive . . . change its nature. . . . Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration. The rehabilitative goals of the system are admirable, but they do not change the drastic nature of the action taken. Incarceration of adults is also intended to produce rehabilitation." *Fain* v. *Duff*, 488 F. 2d, at 225. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 8–9 (1967).

rity" in a juvenile, and imposes a "heavy personal strain." See *Green* v. *United States, supra,* at 187; *United States* v. *Jorn, supra,* at 479; Snyder, The Impact of the Juvenile Court Hearing on the Child, 17 Crime & Delinquency 180 (1971). And we can expect that, since our decisions implementing fundamental fairness in the juvenile-court system, hearings have been prolonged, and some of the burdens incident to a juvenile's defense increased, as the system has assimilated the process thereby imposed. See Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan. L. Rev. 874, 902 n. 138 (1972). Cf. Canon & Kolson, Rural Compliance with Gault: Kentucky, A Case Study, 10 J. Fam. L. 300, 320–326 (1971).

We deal here, not with "the formalities of the criminal adjudicative process," *McKeiver* v. *Pennsylvania,* 403 U. S., at 551 (opinion of BLACKMUN, J.), but with an analysis of an aspect of the juvenile-court system in terms of the kind of risk to which jeopardy refers. Under our decisions we can find no persuasive distinction in that regard between the proceeding conducted in this case pursuant to Cal. Welf. & Inst'ns Code § 701 (1966) and a criminal prosecution, each of which is designed "to vindicate [the] very vital interest in enforcement of criminal laws." *United States* v. *Jorn, supra,* at 479. We therefore conclude that respondent was put in jeopardy at the adjudicatory hearing. Jeopardy attached when respondent was "put to trial before the trier of the facts," 400 U. S., at 479, that is, when the Juvenile Court, as the trier of the facts, began to hear evidence. See *Serfass* v. *United States,* 420 U. S., at 388.[13]

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[13] The same conclusion was reached by the California Court of Appeal in denying respondent's petition for a writ of habeas corpus. *In re Gary J.,* 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 189 (1971).

III

Petitioner argues that, even assuming jeopardy attached at respondent's adjudicatory hearing, the procedure by which he was transferred from Juvenile Court and tried on a felony information in Superior Court did not violate the Double Jeopardy Clause. The argument is supported by two distinct, but in this case overlapping, lines of analysis. First, petitioner reasons that the procedure violated none of the policies of the Double Jeopardy Clause or that, alternatively, it should be upheld by analogy to those cases which permit retrial of an accused who has obtained reversal of a conviction on appeal. Second, pointing to this Court's concern for "the juvenile court's assumed ability to function in a unique manner," *McKeiver* v. *Pennsylvania, supra,* at 547, petitioner urges that, should we conclude traditional principles "would otherwise bar a transfer to adult court after a delinquency adjudication," we should avoid that result here because it "would diminish the flexibility and informality of juvenile court proceedings without conferring any additional due process benefits upon juveniles charged with delinquent acts."

A

We cannot agree with petitioner that the trial of respondent in Superior Court on an information charging the same offense as that for which he had been tried in Juvenile Court violated none of the policies of the Double Jeopardy Clause. For, even accepting petitioner's premise that respondent "never faced the risk of more than one punishment," we have pointed out that "the Double Jeopardy Clause . . . is written in terms of potential or risk of *trial* and conviction, not punishment." *Price* v. *Georgia,* 398 U. S., at 329. (Emphasis added.) And we have recently noted:

"The policy of avoiding multiple trials has been

> regarded as so important that exceptions to the principle have been only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. . . . It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, even though the Government enjoyed no similar right. . . . Following the same policy, the Court has granted the Government the right to retry a defendant after a mistrial only where 'there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.' *United States* v. *Perez*, 9 Wheat. 579, 580 (1824)." *United States* v. *Wilson*, 420 U. S. 332, 343–344 (1975). (Footnote omitted.)

Respondent was subjected to the burden of two trials for the same offense; he was twice put to the task of marshaling his resources against those of the State, twice subjected to the "heavy personal strain" which such an experience represents. *United States* v. *Jorn*, 400 U. S., at 479. We turn, therefore, to inquire whether either traditional principles or "the juvenile court's assumed ability to function in a unique manner," *McKeiver* v. *Pennsylvania*, *supra*, at 547, supports an exception to the "constitutional policy of finality" to which respondent would otherwise be entitled. *United States* v. *Jorn*, *supra*, at 479.

B

In denying respondent's petitions for writs of habeas corpus, the California Court of Appeal first, and the United States District Court later, concluded that no new jeopardy arose as a result of his transfer from Juvenile Court and trial in Superior Court. See *In re Gary J.*, 17 Cal. App. 3d, at 710, 95 Cal. Rptr., at 189; 343 F. Supp., at 692. In the view of those courts, the jeopardy that attaches at an adjudicatory hearing

continues until there is a final disposition of the case under the adult charge. See also *In re Juvenile*, 364 Mass. 531, 306 N. E. 2d 822 (1974). Cf. *Bryan* v. *Superior Court*, 7 Cal. 3d 575, 498 P. 2d 1079 (1972), cert. denied, 410 U. S. 944 (1973).

The phrase "continuing jeopardy" describes both a concept and a conclusion. As originally articulated by Mr. Justice Holmes in his dissent in *Kepner* v. *United States*, 195 U. S. 100, 134–137 (1904), the concept has proved an interesting model for comparison with the system of constitutional protection which the Court has in fact derived from the rather ambiguous language and history of the Double Jeopardy Clause. See *United States* v. *Wilson*, *supra*, at 351–352. Holmes' view has "never been adopted by a majority of this Court." *United States* v. *Jenkins*, 420 U. S. 358, 369 (1975).

The conclusion, "continuing jeopardy," as distinguished from the concept, has occasionally been used to explain why an accused who has secured the reversal of a conviction on appeal may be retried for the same offense. See *Green* v. *United States*, 355 U. S., at 189; *Price* v. *Georgia*, 398 U. S., at 326; *United States* v. *Wilson*, *supra*, at 343–344, n. 11. Probably a more satisfactory explanation lies in analysis of the respective interests involved. See *United States* v. *Tateo*, 377 U. S. 463, 465–466 (1964); *Price* v. *Georgia*, *supra*, at 329 n. 4; *United States* v. *Wilson*, *supra*. Similarly, the fact that the proceedings against respondent had not "run their full course," *Price* v. *Georgia*, *supra*, at 326, within the contemplation of the California Welfare and Institutions Code, at the time of transfer, does not satisfactorily explain why respondent should be deprived of the constitutional protection against a second trial. If there is to be an exception to that protection in the context of the juvenile-court system, it must be justified by interests of society, reflected in that unique institution,

or of juveniles themselves, of sufficient substance to render tolerable the costs and burdens, noted earlier, which the exception will entail in individual cases.

C

The possibility of transfer from juvenile court to a court of general criminal jurisdiction is a matter of great significance to the juvenile. See *Kent* v. *United States,* 383 U. S. 541 (1966). At the same time, there appears to be widely shared agreement that not all juveniles can benefit from the special features and programs of the juvenile-court system and that a procedure for transfer to an adult court should be available. See, *e. g.,* National Advisory Commission on Criminal Justice Standards and Goals, Courts, Commentary to Standard 14.3, pp. 300–301 (1973). This general agreement is reflected in the fact that an overwhelming majority of jurisdictions permits transfer in certain circumstances.[14] As might be expected, the statutory provisions differ in numerous details. Whatever their differences, however, such transfer provisions represent an attempt to impart to the juvenile-court system the flexibility needed to deal with youthful offenders who cannot benefit from the specialized guidance and treatment contemplated by the system.

We do not agree with petitioner that giving respondent the constitutional protection against multiple trials in this context will diminish flexibility and informality to the extent that those qualities relate uniquely to the goals of the juvenile-court system.[15] We

[14] See generally Task Force Report, *supra,* n. 12, at 24–25. See also Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. & Mary L. Rev. 266, 297–300 (1972); Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings, 6 U. Tol. L. Rev. 1, 21–22 (1974).

[15] That the flexibility and informality of juvenile proceedings are

agree that such a holding will require, in most cases, that the transfer decision be made prior to an adjudicatory hearing. To the extent that evidence concerning the alleged offense is considered relevant,[16] it may be that, in those cases where transfer is considered and rejected, some added burden will be imposed on the juvenile courts by reason of duplicative proceedings. Finally, the nature of the evidence considered at a transfer hearing may in

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diminished by the application of due process standards is not open to doubt. Due process standards inevitably produce such an effect, but that tells us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions.

[16] Under Cal. Welf. & Inst'ns Code § 707 (1972), the governing criterion with respect to transfer, assuming the juvenile is 16 years of age and is charged with a violation of a criminal statute or ordinance, is amenability "to the care, treatment and training program available through the facilities of the juvenile court." The section further provides that neither "the offense, in itself" nor a denial by the juvenile of the facts or conclusions set forth in the petition shall be "sufficient to support a finding that [he] is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law." See n. 5, *supra*. The California Supreme Court has held that the only factor a juvenile court must consider is the juvenile's "behavior pattern as described in the probation officer's report," *Jimmy H.* v. *Superior Court*, 3 Cal. 3d 709, 714, 478 P. 2d 32, 35 (1970), but that it may also consider, *inter alia*, the nature and circumstances of the alleged offense. See *id.*, at 716, 478 P. 2d, at 36.

In contrast to California, which does not require any evidentiary showing with respect to the commission of the offense, a number of jurisdictions require a finding of probable cause to believe the juvenile committed the offense before transfer is permitted. See Rudstein, *supra*, n. 14, at 298–299; Carr, *supra*, n. 14, at 21–22. In addition, two jurisdictions appear presently to require a finding of delinquency before the transfer of a juvenile to adult court. Ala. Code, Tit. 13, § 364 (1959) (see *Rudolph* v. *State*, 286 Ala. 189, 238 So. 2d 542 (1970)); W. Va. Code Ann. § 49–5–14 (1966).

some States require that, if transfer is rejected, a different judge preside at the adjudicatory hearing.[17]

We recognize that juvenile courts, perhaps even more than most courts, suffer from the problems created by spiraling caseloads unaccompanied by enlarged resources and manpower. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 7–8 (1967). And courts should be reluctant to impose on the juvenile-court system any additional requirements which could so strain its resources as to endanger its unique functions. However, the burdens that petitioner envisions appear to us neither qualitatively nor quantitatively sufficient to justify a departure in this context from the fundamental prohibition against double jeopardy.

A requirement that transfer hearings be held prior to adjudicatory hearings affects not at all the nature of the latter proceedings. More significantly, such a requirement need not affect the quality of decisionmaking at transfer hearings themselves. In *Kent* v. *United States*, 383 U. S., at 562, the Court held that hearings under the statute there involved "must measure up to the essentials of due process and fair treatment." However, the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-

[17] See, *e. g.*, Fla. Stat. Ann. § 39.09 (2)(g) (1974); Tenn. Code. Ann. § 37–234 (e) (Supp. 1974); Wyo. Stat. § 14–115.38 (c) (Supp. 1973); Uniform Juvenile Court Act § 34 (e), approved in July 1968 by the National Conference of Commissioners on Uniform State Laws. See also *Donald L.* v. *Superior Court*, 7 Cal. 3d 592, 598, 498 P. 2d 1098, 1101 (1972).

court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings.[18]

Moreover, we are not persuaded that the burdens petitioner envisions would pose a significant problem for the administration of the juvenile-court system. The large number of jurisdictions that presently require that the transfer decision be made prior to an adjudicatory hearing,[19] and the absence of any indication that the juvenile courts in those jurisdictions have not been able to perform their task within that framework, suggest the contrary. The likelihood that in many cases the lack of need or basis for a transfer hearing can be recognized promptly reduces the number of cases in which a commitment of resources is necessary. In addition, we have no reason to believe that the resources

[18] We note that nothing decided today forecloses States from requiring, as a prerequisite to the transfer of a juvenile, substantial evidence that he committed the offense charged, so long as the showing required is not made in an adjudicatory proceeding. See *Collins* v. *Loisel*, 262 U. S. 426 429 (1923); *Serfass* v. *United States*, 420 U. S. 377, 391–392 (1975). The instant case is not one in which the judicial determination was simply a finding of, *e. g.*, probable cause. Rather, it was an adjudication that respondent had violated a criminal statute.

[19] See Rudstein, *supra*, n. 14, at 299–300; Carr, *supra*, n. 14, at 24, 57–58. See also Uniform Juvenile Court Act §§ 34 (a), (c); Council of Judges of the Nat. Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 9 (1969); W. Sheridan, Legislative Guide for Drafting Family and Juvenile Court Acts §§ 27, 31 (a) (Dept. of HEW, Children's Bureau Pub. No. 472–1969). In contrast, apparently only three States presently require that a hearing on the juvenile petition or complaint precede transfer. Ala. Code, Tit. 13, § 364 (1959) (see *Rudolph* v. *State*, *supra*); Mass. Gen. Laws Ann., c. 119, § 61 (1969) (see *In re Juvenile*, 364 Mass. 531, 542, and n. 10, 306 N. E. 2d 822, 829–830, and n. 10 (1974)); W. Va. Code Ann. § 49–5–14 (1966).

available to those who recommend transfer or participate in the process leading to transfer decisions are inadequate to enable them to gather the information relevant to informed decision prior to an adjudicatory hearing. See generally *State* v. *Halverson*, 192 N. W. 2d 765, 769 (Iowa 1971); Rudstein, Double Jeopardy in Juvenile Proceedings, 14 Wm. & Mary L. Rev. 266, 305–306 (1972); Note, 24 Stan. L. Rev., at 897–899.[20]

To the extent that transfer hearings held prior to adjudication result in some duplication of evidence if transfer is rejected, the burden on juvenile courts will tend to be offset somewhat by the cases in which, because of transfer, no further proceedings in juvenile court are required. Moreover, when transfer has previously been rejected, juveniles may well be more likely to admit the commission of the offense charged, thereby obviating the need for adjudicatory hearings, than if transfer remains a possibility. Finally, we note that those States which presently require a different judge to preside at an adjudicatory hearing if transfer is rejected also permit waiver of that requirement.[21] Where the requirement is not waived, it is difficult to see a substantial strain on judicial resources. See Note, 24 Stan. L. Rev., at 900–901.

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[20] We intimate no views concerning the constitutional validity of transfer following the attachment of jeopardy at an adjudicatory hearing where the information which forms the predicate for the transfer decision could not, by the exercise of due diligence, reasonably have been obtained previously. Cf., *e. g.*, *Illinois* v. *Somerville*, 410 U. S. 458 (1973).

[21] See the statutes cited in n. 16, *supra*. "The reason for this waiver provision is clear. A juvenile will ordinarily not want to dismiss a judge who has refused to transfer him to a criminal court. There is a risk of having another judge assigned to the case who is not as sympathetic. Moreover, in many cases, a rapport has been established between the judge and the juvenile, and the goal of rehabilitation is well on its way to being met." Brief for National Council of Juvenile Court Judges as *Amicus Curiae* 38.

Quite apart from our conclusions with respect to the burdens on the juvenile-court system envisioned by petitioner, we are persuaded that transfer hearings prior to adjudication will aid the objectives of that system. What concerns us here is the dilemma that the possibility of transfer after an adjudicatory hearing presents for a juvenile, a dilemma to which the Court of Appeals alluded. See *supra*, at 527. Because of that possibility, a juvenile, thought to be the beneficiary of special consideration, may in fact suffer substantial disadvantages. If he appears uncooperative, he runs the risk of an adverse adjudication, as well as of an unfavorable dispositional recommendation.[22] If, on the other hand, he is cooperative, he runs the risk of prejudicing his chances in adult court if transfer is ordered. We regard a procedure that results in such a dilemma as at odds with the goal that, to the extent fundamental fairness permits, adjudicatory hearings be informal and nonadversary. See *In re Gault*, 387 U. S., at 25–27; *In re Winship*, 397 U. S., at 366–367; *McKeiver* v. *Pennsylvania*, 403 U. S., at 534, 550. Knowledge of the risk of transfer after an adjudicatory hearing can only undermine the potential for informality and cooperation which was intended to be the hallmark of the juvenile-court system. Rather than concerning themselves with the matter at hand, establishing innocence or seeking a disposition best suited to individual

[22] Although denying respondent's petition for a writ of habeas corpus, the judge of the Juvenile Court noted: "If he doesn't open up with a probation officer there is of course the danger that the probation officer will find that he is so uncooperative that he cannot make a recommendation for the kind of treatment you think he really should have and, yet, as the attorney worrying about what might happen a[t] the disposition hearing, you have to advise him to continue to more or less stand upon his constitutional right not to incriminate himself . . . ." App. 38. See Note, Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts, 24 Stan. L. Rev. 874, 902 n. 137 (1972).

correctional needs, the juvenile and his attorney are pressed into a posture of adversary wariness that is conducive to neither. Cf. Kay & Segal, The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach, 61 Geo. L. J. 1401 (1973); Carr, The Effect of the Double Jeopardy Clause on Juvenile Proceedings, 6 U. Tol. L. Rev. 1, 52–54 (1974).[23]

IV

We hold that the prosecution of respondent in Superior Court, after an adjudicatory proceeding in Juvenile Court, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment. The mandate of the Court of Appeals, which was stayed by that court pending our decision, directs the District Court "to issue a writ of habeas corpus directing the state court, within 60 days, to vacate the adult conviction of Jones and either set him free or remand him to the juvenile court for disposition." Since respondent is no longer subject to the jurisdiction of the California Juvenile Court, we vacate the judgment and remand the case to the Court of Appeals for such further proceedings consistent with this opinion as may be appropriate in the circumstances.

So ordered.

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[23] With respect to the possibility of "making the juvenile proceedings confidential and not being able to be used against the minor," the judge of the Juvenile Court observed: "I must say that doesn't impress me because if the minor admitted something in the Juvenile Court and named his companions nobody is going to eradicate from the minds of the district attorney or other people the information they obtained." App. 41–42.

FRY ET AL. *v.* UNITED STATES

CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 73-822. Argued November 11, 1974—Decided May 27, 1975

The Economic Stabilization Act of 1970 authorized the President to stabilize wages and salaries at certain levels, and the Pay Board was created to oversee the controls. The Government filed this action to enjoin Ohio and its officials from paying state statutory wage and salary increases to state employees above the amount authorized by the Pay Board. The Temporary Emergency Court of Appeals, on certification from the District Court, construed the Act as applying to state employees, upheld its constitutionality, and enjoined payment of the increases. *Held:*

1. The Act's language contemplating general stabilization of "prices, rents, wages, salaries, dividends, and interest" and providing that the controls should "call for generally comparable sacrifices by business and labor as well as other segments of the economy," and its legislative history showing that Congress had rejected an amendment exempting state employees, make it clear that the Act was intended to apply to employees generally, including state employees. That the Act did not expressly refer to the States warrants no inference that controls could not extend to their employees. Pp. 545–546.

2. The Act was constitutional as applied to state employees. Pp. 547–548.

(a) General raises to state employees, even though purely intrastate in character, could significantly affect interstate commerce, and thus could be validly regulated by Congress under the Commerce Clause. P. 547.

(b) States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status. *Maryland* v. *Wirtz*, 392 U. S. 183. Here, where the Act did not appreciably intrude on state sovereignty but was an emergency measure to counter severe inflation, the effectiveness of federal action would have been drastically impaired if wage increases to state and local governmental employees (who at the time the wage freeze was activated composed 14% of the Nation's work force) were left outside the Act's reach. Pp. 547–548.

(c) Since the Ohio wage legislation conflicted with the Pay Board's ruling, the State must yield under the Supremacy Clause to the federal mandate. P. 548.

487 F. 2d 936, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a separate statement, *post*, p. 549. REHNQUIST, J., filed a dissenting opinion, *post*, p. 549.

John A. Brown argued the cause and filed briefs for petitioners.

Deputy Solicitor General Lafontant argued the cause for the United States. On the brief were *Solicitor General Bork, Assistant Attorney General Hills, Deputy Solicitor General Friedman, William L. Patton,* and *William G. Kanter.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Economic Stabilization Act of 1970[1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing

*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger*, Attorney General, *Willard A. Shank*, Assistant Attorney General, and *Talmadge R. Jones*, Deputy Attorney General, for the State of California; by *William J. Brown*, Attorney General, *Robert B. Meany*, Assistant Attorney General, and *James A. Laurenson* for the State of Ohio; by *John C. Danforth*, Attorney General, and *Gene E. Voigts* for the State of Missouri; by *Loren E. McMaster* for the California State Employees' Assn.; and by *Stephen S. Boynton* for the Assembly of Governmental Employees.

A. L. Zwerdling, Robert H. Chanin, and *George Kaufmann* filed a brief for the Coalition of American Public Employees as *amicus curiae* urging affirmance.

[1] Title II of the Act of Aug. 15, 1970, Pub. L. 91–379, 84 Stat. 799, as amended, note following 12 U. S. C. § 1904 (1970 ed., Supp. I). The Act was extended five times before it expired on April 30, 1974.

on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Exec. Order No. 11627, 3 CFR 218 (1971 Comp.), note following 12 U. S. C. § 1904 (1970 ed., Supp. I). In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for approval of the increases, and a public hearing was held. In March 1972, the Board denied the application for an exemption to the extent that it exceeded salary increases of 7% for the 1972 wage year.[4] Petitioners, two state employees, sought a writ of mandamus in state court to compel Ohio officials to pay the full increases provided in the state pay act. The Ohio Supreme Court granted the writ and ordered the increases to be paid. *State ex rel. Fry* v. *Ferguson,* 34 Ohio St. 2d 252, 298 N. E. 2d 129 (1973).

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[2] 6 CFR §§ 101.21, 201.10 (1971). See also 6 CFR § 101.28 (1972).

[3] Ohio Rev. Code Ann. § 143.10 (A) (Supp. 1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

[4] The Pay Board determined that the implementation of the pay increase from March 1972 to November 1972 would reduce the effective rate to 7% for the wage year November 14, 1971, to November 13, 1972. The payments in issue here therefore represent the wages and salaries that were due from January 1, 1972, when the pay increase was to take effect, to March 16, 1972. The total amount involved is $10.5 million.

After the State Supreme Court decision, the United States filed this action in the District Court to enjoin Ohio and its officials from paying wage and salary increases in excess of the 7% authorized by the Pay Board. The District Court certified to the Temporary Emergency Court of Appeals the question of the applicability of federal wage and salary controls to state employees. See § 211 (c) of the Economic Stabilization Act, note following 12 U. S. C. § 1904 (1970 ed., Supp. I).

The Court of Appeals construed the Act as applying to state employees and as thus construed upheld its constitutionality. *United States* v. *Ohio*, 487 F. 2d 936 (1973). Relying on the decisions of this Court in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), and *United States* v. *California*, 297 U. S. 175 (1936), the court concluded that the interference with state affairs incident to the uniform implementation of federal economic controls was of no consequence since Congress had a rational basis upon which to conclude that the state activity substantially affected commerce. The Court of Appeals accordingly enjoined the payment of wage and salary increases in excess of the amount authorized by the Pay Board. We affirm.

I

At the outset, it is contended that Congress did not intend to include state employees within the reach of the Economic Stabilization Act and that the Pay Board therefore did not have the authority to regulate the compensation due state employees.[5] We disagree. The language and legislative history of the Act leave no doubt

[5] Petitioners did not raise the statutory issue either in their petition for certiorari or in their brief. Rather than decide a constitutional question when there may be doubt whether there is any statutory basis for it, however, we deal first with the statutory question, which is addressed in the briefs of *amici curiae* seeking reversal.

that Congress intended that it apply to employees throughout the economy, including those employed by state and local governments. The Act contemplated general stabilization of "prices, rents, wages, salaries, dividends, and interest," § 202, note following 12 U. S. C. § 1904 (1970 ed., Supp. I), and it provided that the controls should "call for generally comparable sacrifices by business and labor as well as other segments of the economy." § 203 (b)(5). It contained no exceptions for employees of any governmental bodies, even at the federal level.[6] The failure of the Act to make express reference to the States does not warrant the inference that controls could not be extended to their employees. See *Case* v. *Bowles*, 327 U. S. 92, 99 (1946); *United States* v. *California*, 297 U. S., at 186. Indeed, in framing the Act, Congress specifically rejected an amendment that would have exempted employees of state and local governments. 117 Cong. Rec. 43673–43677 (1971). And the Senate Committee Report makes it plain that the Committee considered and rejected a proposed exemption for the same group. S. Rep. No. 92–507, p. 4 (1971). It is clear, then, that Congress intended to reach state and local governmental employees. The only remaining question is whether it could do so consistent with the constitutional limitations on its power.

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[6] Congress did provide for the exemption of certain categories of employees, such as members of the working poor, those earning substandard wages, and those entitled to wage increases under the Fair Labor Standards Act. §§ 203 (d) and (f), note following 12 U. S. C. § 1904 (1970 ed., Supp. I). See also §§ 203 (c)(1)–(3), (f)(2), (3), and (g). The various stabilization agencies have uniformly interpreted the Act to include the States within its scope, see 36 Fed. Reg. 21790, 25428 (1971); 37 Fed. Reg. 1240, 24961, 24989–24991 (1972). We have long recognized that the interpretation of a statute by an implementing agency is entitled to great weight. *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965).

II

Petitioners acknowledge that Congress' power under the Commerce Clause is very broad. Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 255 (1964); *Wickard* v. *Filburn*, 317 U. S. 111, 127–128 (1942). There is little difficulty in concluding that such an effect could well result from large wage increases to 65,000 employees in Ohio and similar numbers in other States; *e. g.*, general raises to state employees could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases.

Petitioners do not appear to challenge Congress' conclusion that unrestrained wage increases, even for employees of wholly intrastate operations, could have a significant effect on commerce. Instead, they contend that applying the Economic Stabilization Act to state employees interferes with sovereign state functions and for that reason the Commerce Clause should not be read to permit regulation of all state and local governmental employees.[7]

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[7] Petitioners have stated their argument, not in terms of the Commerce power, but in terms of the limitations on that power imposed by the Tenth Amendment. While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States* v. *Darby*, 312 U. S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. Despite the extravagant claims on this score made by some *amici*, we are con-

On the facts of this case, this argument is foreclosed by our decision in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), where we held that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by a State. *Wirtz* reiterated the principle that States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status. 392 U. S., at 196–197. We noted, moreover, that the statute at issue in *Wirtz* was quite limited in application. The federal regulation in this case is even less intrusive. Congress enacted the Economic Stabilization Act as an emergency measure to counter severe inflation that threatened the national economy. H. R. Rep. No. 91–1330, pp. 9–11 (1970). The method it chose, under the Commerce Clause, was to give the President authority to freeze virtually all wages and prices, including the wages of state and local governmental employees. In 1971, when the freeze was activated, state and local governmental employees composed 14% of the Nation's work force. Brief for United States 20. It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls.

We conclude that the Economic Stabilization Act was constitutional as applied to state and local governmental employees. Since the Ohio wage legislation conflicted with the Pay Board's ruling, under the Supremacy Clause the State must yield to the federal mandate. See *Public Utilities Comm'n of California* v. *United States*, 355 U. S. 534, 542–545 (1958); *Murphy* v. *O'Brien*, 485 F. 2d 671, 675 (Temp. Emerg. Ct. App. 1973).

Affirmed.

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vinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.

MR. JUSTICE DOUGLAS.

Less than three months after we granted certiorari, Congress allowed the Economic Stabilization Act to expire on April 30, 1974. There is therefore no continuing impediment to the payment of salary increases of the kind at issue in this case. I would therefore dismiss the writ as improvidently granted.

MR. JUSTICE REHNQUIST, dissenting.

Mr. Chief Justice Chase in his opinion for the Court in *Texas* v. *White*, 7 Wall. 700, 725 (1869), declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." A little over a century later, there can be no doubt that we have an indestructible Union, but the Court's opinion in this case is the latest in a series of decisions which casts some doubt upon whether those States are indeed "indestructible."

Maryland v. *Wirtz*, 392 U. S. 183 (1968), held that Congress could impose the provisions of the Fair Labor Standards Act upon state entities, so as to regulate the maximum number of hours and minimum wages received by state employees of hospitals, institutions, and schools. The Court's opinion in this case not unreasonably relies on *Wirtz* in holding that Congress may impose across-the-board limitations on salary increases for all state employees. In their briefs and arguments to this Court, petitioners sought to distinguish *Wirtz* on the ground that the employees there regulated were performing primarily "proprietary" functions. The Government countered this argument with language from *United States* v. *California*, 297 U. S. 175 (1936), a case which is not discussed by the Court but which was critical to the development of the doctrine which the Court today applies. There the Court held that the State of California, in

operating a railroad wholly within its own boundaries, was subject to the provisions of the Federal Safety Appliance Act.

Today's decision, like *Maryland* v. *Wirtz, supra,* and *United States* v. *California, supra,* is plausible on its facts. Congress in the Economic Stabilization Act of 1970 wished to check runaway inflation, and as a means to that end sought to control increases in wages and salaries. Since state employees constitute a significant portion of the labor force as a whole, Congress could reasonably conclude that a stabilization scheme which excluded such employees from its ambit would be less effective than one which included them. And, of course, precisely the same reasoning may be advanced in support of the result in *Wirtz* and in *United States* v. *California.*

Yet the danger to our federal system which is emphasized by these three cases taken together, as it is not by any one taken separately, seems to me quite manifest. The Tenth Amendment, the Court's opinion in this case insists, does have meaning; but the critical question is how much meaning is left to it and the basic constitutional principles which it illumines. As stated by MR. JUSTICE DOUGLAS, dissenting in *Maryland* v. *Wirtz, supra,* at 205:

> "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."

I do not believe that the Constitution was intended to permit the result reached today, and so I dissent.

United States v. *California, supra,* stated a principle of Congress' Commerce Clause power over state activities which was deemed "controlling" in *Maryland* v. *Wirtz, supra,* at 198. It is thus necessary to begin this analysis with Mr. Chief Justice Stone's opinion for a unani-

mous Court in that case. One shoulders a heavy burden of proof in seeking to demonstrate that that opinion is analytically flawed. Yet its treatment of the issue of intergovernmental immunity is less than satisfactory, even though the case may have reached a sound result upon its facts. The case was decided in 1936, at the beginning of what might be called the present era of Commerce Clause law in this Court. The Court was in the process, later completed in cases such as *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and *United States* v. *Darby*, 312 U. S. 100 (1941), of freeing both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause which had previously been used to deny both to the States and to Congress authority to regulate economic affairs. It is quite understandable in this context that the Court in *United States* v. *California* should have been inclined to give somewhat short shrift to a claim of "States' rights," even when invoked by the State itself against congressional authority under the Commerce Clause. The claim of "States' rights" had so frequently been invoked in the past as a form of *ius tertii*, not by a State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the Court.

The Court's *California* opinion states: "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce." 297 U. S., at 184. But this familiar doctrine of *The Shreveport Rate Cases*, 234 U. S. 342 (1914), that under the Supremacy

Clause even intrastate commerce which affects interstate commerce is subject to Congress' overriding authority to regulate commerce, is not a full answer to the claim of a State that it may not be regulated *as a State*. Neither California in that case, Maryland in *Wirtz*, nor Ohio in this case, questions that Congress may pre-empt state regulatory authority in areas where both bodies are otherwise competent to act. But this well-recognized principle of the Supremacy Clause is traditionally associated with federal regulation of persons or enterprises, rather than with federal regulation of the State itself, and it is difficult to understand how it supports the proposition that the States are without a constitutional counterweight which can limit Congress' exercise *against them* of its commerce power.

The Court in *California* went on to consider the analogy of constitutional immunity of state instrumentalities from federal taxation, but rejected it as "not illuminating." 297 U. S., at 184. Apparently conceding that if the principles relating to tax immunity were applied, the State would prevail, the Court rejected their relevance, saying:

> "But there is no such limitation upon the plenary power to regulate commerce. *The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" *Id.*, at 185. (Emphasis added.)

The italicized statement seems to me demonstrably wrong, and I believe it is recognized as being wrong by the Court's opinion today, with its reference to the fact that the Tenth Amendment "is not without significance." *Ante*, at 547 n. 7. In explaining why it is wrong, it is useful to explore further the situation of an individual confronted with Commerce Clause regulation. Such an individual who attacks an Act of Congress on the ground

that it is not within congressional authority under the Commerce Clause asserts only a claim of lack of legislative power. Under cases such as *The Shreveport Rate Cases, supra*, *Wickard* v. *Filburn*, 317 U. S. 111 (1942), and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964), this individual's claim is ordinarily very difficult to sustain. But an individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendment, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the latter claim is of greater force, and may succeed when the former will fail, is well established. See, *e. g.*, *Leary* v. *United States*, 395 U. S. 6 (1969); *United States* v. *Jackson*, 390 U. S. 570 (1968); *United States* v. *Cardiff*, 344 U. S. 174 (1952); *Tot* v. *United States*, 319 U. S. 463 (1943).

In this case, as well as in *Wirtz* and *United States* v. *California*, the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority. Whether such a claim on the part of a State should prevail against congressional authority is quite a different question, but it is surely no answer to the claim to say that a "state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States* v. *California, supra*, at 185. Such an answer is simply a denial of the inherent affirmative constitutional limitation on congressional power which I believe the States possess.

It is not apparent to me why a State's immunity from the plenary authority of the National Government to tax, *United States* v. *Butler*, 297 U. S. 1 (1936), should

have been thought by the *California* court to be any higher on the scale of constitutional values than is a State's claim to be free from the imposition of Congress' plenary authority under the Commerce Clause. Especially is this true because the immunity from taxation has no explicit constitutional source and appears to rest solely on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause. Indeed, if history and precedent offered no guide, I would think as a matter of logic that it would be less of an encumbrance upon a State to pay a nondiscriminatory tax imposed by the Federal Government than it would be to comply with nondiscriminatory regulation enacted by that Government. Where the Federal Government seeks only revenue from the State, the State may provide the revenue and make up the difference where it chooses among its sources of revenue or demands for expenditure. But where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer.

Much of the law of intergovernmental tax immunity to which the Court referred in *United States* v. *California, supra,* has gone the way of all flesh, and the scope of the then-prevalent doctrine that the Federal Government might not impose a tax on an "instrumentality" of a State was shortly modified. See *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939), which made clear that today's Congress may impose an income tax on state employees.[1] Several years after the *Graves* decision,

[1] It may seem but a short step from Congress' requiring the employee of a State to pay a percentage of his salary to the Federal Government in the form of an income tax, on the one hand, to Congress' using its Commerce Clause authority to direct the State

however, the Court had occasion to discuss the question of intergovernmental tax immunity in *New York* v. *United States*, 326 U. S. 572 (1946). There was no opinion for the Court; Mr. Justice Frankfurter, joined by Mr. Justice Rutledge, delivered the judgment of the Court and an opinion stating that with limited exceptions the federal taxing power could be imposed on a State so long as it was not exercised in a discriminatory manner. But a majority of the Court refused to adopt this formulation of the test. Mr. Chief Justice Stone, who was the author of the Court's opinion in *United States* v. *California*, *supra*, spoke for himself and Justices Reed, Murphy, and Burton in stating that "we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike." 326 U. S., at 586. MR. JUSTICE DOUGLAS, joined by Mr. Justice Black, dissented outright, and thought that the authority of Congress to tax revenues obtained by New York from the business of selling its mineral water could not

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to pay its employees no more than a certain amount of money in the form of salaries and wages. But rough similarities in practical effect do not necessarily lead to similar holdings on the question of constitutional power. Where Congress taxes the income of a state employee, its command is addressed to the employee alone after he has performed his work for the State and received his pay therefor. Under the regulations which the Court upholds today, the State of Ohio is itself told that it may not pay more than specified amounts to its various employees. Though the economic effect of the two measures on the State may be in some respects similar, the fact that the command of Congress operates directly upon the State in the latter situation is of significance in a system of constitutional federalism such as ours. The Court in *Helvering* v. *Gerhardt*, 304 U. S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, a question which it decided in favor of taxability.

be constitutionally sustained. Thus six Members of the Court, as it was then constituted, thought that the principles of federalism reflected in the Tenth Amendment to the Constitution did not stop with merely prohibiting Congress from discriminating between States and other taxable entities in the exercise of its taxing power.

In his concurring opinion, Mr. Chief Justice Stone expressed the matter as follows:

> "[A] federal tax which is not discriminatory as to the subject matter may nevertheless so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. The counterpart of such undue interference has been recognized since Marshall's day as the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other. . . .
>
> ". . . [I]t is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo* v. *United States,* 319 U. S. 441, 447–448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U. S., at 587.

The Court's decision in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. The familiar history of this Court's

decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), and the subsequent reaction which gave rise to the enactment of the Eleventh Amendment, has been told and retold. *Monaco* v. *Mississippi,* 292 U. S. 313, 323–325 (1934); *Edelman* v. *Jordan,* 415 U. S. 651, 660–662 (1974). But the Eleventh Amendment by its terms forbade the federal courts only to entertain suits by the citizens of one State against another State. *Hans* v. *Louisiana* involved a suit by citizens of Louisiana against Louisiana, and was therefore not within the literal language of the Eleventh Amendment. Nevertheless this Court, after canvassing the understanding of the Framers of the Constitution and the controversial decision in *Chisholm,* unanimously concluded that such an action would not lie, saying:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." 134 U. S., at 21.

As it was not the Eleventh Amendment by its terms which justified the result in *Hans,* it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

I would hold that the activity of the State of Cali-

fornia in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act. But the operation of schools, hospitals, and like facilities involved in *Maryland* v. *Wirtz* is an activity sufficiently closely allied with traditional state functions that the wages paid by the State to employees of such facilities should be beyond Congress' commerce authority. Such a distinction would undoubtedly present gray areas to be marked out on a case-by-case basis, as is true in applying any number of other constitutional principles. But today's case, in which across-the-board wage and salary ceilings are sustained with respect to virtually all state employees, is clearly on the forbidden side of that line.[2]

Congress may well in time of declared war have extraordinary authority to regulate activities in the national interest which could not be reached by the commerce power alone. Cf. *Yakus* v. *United States*, 321 U. S. 414

[2] As noted earlier in this dissent, the Government contends that *United States* v. *California*, 297 U. S. 175 (1936), makes it impossible to distinguish *Wirtz* on the basis that the employees in that case were performing primarily "proprietary" functions. *California* may certainly be read as rejecting not only this distinction, but also any other among activities conducted by a State, and as enunciating a rule that all state activities may be regulated by Congress. But such a sweeping doctrine is rejected even by the Court's present opinion, which if it means what it says must concede that a line will have to be drawn somewhere. It is conceivable that the traditional distinction between "governmental" and "proprietary" activities might in some form prove useful in such line drawing. The distinction suggested in *New York* v. *United States*, 326 U. S. 572 (1946), between activities traditionally undertaken by the State and other activities, might also be of service, although it too was specifically rejected in *California*. See 297 U. S., at 185. Here, of course, it is unnecessary to engage in the business of line drawing, since the regulation in question sweeps within its ambit virtually all state employees regardless of their tasks.

(1944). Congress may well be empowered under the legislative authority granted to it by the Fourteenth and Fifteenth Amendments to the Constitution to impose significant restrictions on what would otherwise be thought state prerogatives. *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). But I do not believe that the Commerce Clause alone is sufficient to sustain the broad and sweeping federal regulation of the maximum salaries which Ohio may pay its employees, nor do I believe that the showing of national emergency made here is sufficient to make this case one in which congressional authority may be derived from sources other than the Commerce Clause.

The overruling of a case such as *Maryland* v. *Wirtz* quite obviously should not be lightly undertaken. But we have the authority of Mr. Chief Justice Taney, dissenting, in *The Passenger Cases,* 7 How. 283, 470 (1849); of Mr. Justice Brandeis, dissenting, in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 405–411 (1932); and of MR. JUSTICE DOUGLAS, dissenting, in *New York* v. *United States,* 326 U. S., at 590–591, for the proposition that important decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions. Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments. I believe that re-examination of the issue decided in *Maryland* v. *Wirtz* would lead us to the conclusion that the judgment of the Temporary Emergency Court of Appeals in this case should be reversed.

DUNLOP, SECRETARY OF LABOR *v.* BACHOWSKI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–466. Argued April 21, 1975—Decided June 2, 1975

After being defeated for office by the incumbent in a union election, and after exhausting his union remedies, respondent candidate (hereafter respondent) filed a complaint with petitioner, the Secretary of Labor, alleging violations of § 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) and thus invoking § 402 (b) of the Act, which requires the Secretary to investigate the complaint and decide whether to bring a civil action to set aside the election. The Secretary, upon investigation, decided that such an action was not warranted and so advised respondent, who then filed an action to have the Secretary's decision declared arbitrary and capricious and to order him to file suit to set aside the election. The District Court dismissed the action on the ground that it lacked "authority" to afford the relief sought. The Court of Appeals reversed and remanded, holding that the District Court had jurisdiction of the action under 28 U. S. C. § 1337 as a case arising under an Act of Congress regulating commerce (the LMRDA); that the Administrative Procedure Act (APA), 5 U. S. C. §§ 702, 704, subjected the Secretary's decision to judicial review as "final agency action for which there is no other adequate remedy in a court"; that his decision was not agency action pursuant to "statutes [that] preclude judicial review; or . . . agency action [that] is committed to agency discretion by law," excepted by 5 U. S. C. § 701 (a) from judicial review; and that the scope of judicial review—governed by 5 U. S. C. § 706 (2) (A) "to ensure that the Secretary's actions are not arbitrary, capricious, or an abuse of discretion"—entitled respondent "to a sufficiently specific statement of the factors upon which the Secretary relied in reaching his decision . . . so that [respondent] may have information concerning the allegations contained in his complaint." *Held:* While 28 U. S. C. § 1337 confers jurisdiction upon the District Court to entertain respondent's suit, and the Secretary's decision against suit is not excepted from judicial review by 5 U. S. C. § 701 (a), but by virtue of

§§ 702 and 704 is reviewable under the standard specified in § 706 (2)(A), the Court of Appeals erred insofar as it construed § 706 (2)(A) to authorize the District Court to allow respondent a trial-type inquiry into the factual bases for the Secretary's decision. Pp. 566–577.

(a) Absent an express prohibition in the LMRDA against judicial review of the Secretary's decision, the Secretary bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision, a presumption that the Secretary failed to overcome in this case. P. 567.

(b) However, a congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision must be inferred in order to fulfill the statutory objectives. P. 568.

(c) Since the LMRDA relies upon the Secretary's knowledge and discretion in determining both the probable violation and the probable effect of a violation on the election's outcome, the reviewing court is not authorized to substitute its judgment for the Secretary's decision not to bring suit, but to enable the court intelligently to review the Secretary's determination, the Secretary must provide the court and the complaining union member with a statement of the supporting reasons. Pp. 568–572.

(d) The reviewing court should confine itself to examining the reasons statement and determining whether the statement, without more, shows that the Secretary's decision is so irrational as to be arbitrary and capricious, and the court's review may not extend to an adversary trial of a complaining union member's challenges to the factual bases for the Secretary's decision. Pp. 572–574.

(e) If the District Court determines that the Secretary's reasons statement adequately demonstrates that his decision against suit is not contrary to law, the complaining union member's suit fails and should be dismissed, whereas if the District Court determines that the statement on its face compels the conclusion that the Secretary's decision not to sue is so irrational as to be arbitrary and capricious, it is assumed that the Secretary would proceed appropriately without the coercion of a court order. Pp. 574–576.

502 F. 2d 79, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and

POWELL, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 590. REHNQUIST, J., filed an opinion concurring in the result in part and dissenting in part, *post*, p. 591.

Mark L. Evans argued the cause for petitioner. On the brief were *Solicitor General Bork, Assistant Attorney General Hills, Deputy Solicitor General Wallace,* and *Beate Bloch.*

Joseph L. Rauh, Jr., argued the cause for respondent Bachowski. With him on the brief were *John Silard, Elliott C. Lichtman,* and *Kenneth J. Yablonski. Michael H. Gottesman* argued the cause for respondent United Steelworkers of America, AFL–CIO. With him on the brief was *Bernard Kleiman.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

On February 13, 1973, the United Steelworkers of America (USWA) held district officer elections in its several districts. Respondent Bachowski (hereinafter respondent) was defeated by the incumbent in the election for that office in District 20.[1] After exhausting his remedies within USWA, respondent filed a timely complaint with petitioner, the Secretary of Labor, alleging violations of § 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 532, 29 U. S. C. § 481, thus invoking 29 U. S. C. §§ 482 (a), (b), which require that the Secretary investigate the complaint and

*Briefs of *amici curiae* urging affirmance were filed by *Joseph A. Yablonski* and *Daniel B. Edelman* for the United Mine Workers of America, and by *Clarice R. Feldman* for the Association for Union Democracy, Inc.

[1] The result of the election was as follows:

Kay Kluz (incumbent)	10,558
Walter Bachowski (respondent)	9,651
Morros Brummett	3,566

decide whether to bring a civil action to set aside the election.[2] Similar complaints were filed respecting five other district elections. After completing his investigations, the Secretary filed civil actions to set aside the elections in only two districts. With respect to the election in District 20, he advised respondent by letter dated November 7, 1973, that "[b]ased on the investigative findings, it has been determined . . . that civil action to set aside the challenged election is not warranted."

On November 7, 1973, respondent filed this action against the Secretary and USWA in the District Court for the Western District of Pennsylvania.[3] The com-

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[2] Title 29 U. S. C. § 482 provides:

"(a) Filing of complaint; presumption of validity of challenged election.

"A member of a labor organization—

"(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

"(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

"may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title . . . . The challenged election shall be presumed valid pending a final decision thereon . . . and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

"(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets.

"The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary . . . ."

[3] The complaint was filed on the date, November 7, 1973, of the letter quoted in the text. The complaint alleges that on Novem-

plaint asked that, among other relief, "the Court declare the actions of the Defendant Secretary to be arbitrary and capricious and order him to file suit to set aside the aforesaid election." The District Court conducted a hearing on November 8, and after argument on the question of reviewability of the Secretary's decision, concluded that the court lacked "authority" to find that the action was capricious and to order him to file suit. Civil Action No. 73–0954, WD Pa., Doc. 9, p. 27. The hearing was followed by an order dated November 12, dismissing the suit.[4] The Court of Appeals for the Third Circuit reversed, 502 F. 2d 79 (1974).

The Court of Appeals held, *first*, that the District Court had jurisdiction of respondent's suit under 28 U. S. C. § 1337 as a case arising under an Act of Congress regulating commerce, the LMRDA, 502 F. 2d, at 82–83; *second*, that the Administrative Procedure Act, 5 U. S. C. §§ 702 and 704, subjected the Secretary's decision to judicial review as "final agency action for which there is no other adequate remedy in a court," § 704, and that his decision was not, as the Secretary maintained, agency action pursuant to "(1) statutes [that] preclude judicial review; or (2) agency action [that] is committed to agency discretion by law," excepted by § 701 (a) from judicial review, 502 F. 2d, at 83–88; [5] and, *third*, that the scope of judicial

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ber 5, respondent "received a phone call from the Pittsburgh office of the Defendant Secretary advising him that the Defendant Secretary had decided not to file suit to set aside the contested election in District 20 USWA."

[4] The Order of November 12 recites that "it is determined that this Court lacks jurisdiction over the subject matter of this Complaint." In view of our result, it is immaterial whether the dismissal was on the ground of lack of jurisdiction or of nonreviewability, or on both grounds.

[5] Section 606 of the LMRDA, 29 U. S. C. § 526, provides:

"The provisions of the Administrative Procedure Act shall be

review—governed by § 706 (2)(A), "to ensure that the Secretary's actions are not arbitrary, capricious, or an abuse of discretion," 502 F. 2d, at 90—entitled respondent, who sought "to challenge the factual basis for [the Secretary's] conclusion either that no violations occurred or that they did not affect the outcome of the election," *id.*, at 89, "to a sufficiently specific statement of the factors upon which the Secretary relied in reaching his decision . . . so that [respondent] may have information concerning the allegations contained in his complaint." *Id.*, at 90.[6] We granted certiorari *sub nom. Brennan* v. *Bachowski*, 419 U. S. 1068 (1974).

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applicable to . . . any adjudication, authorized or required pursuant to the provisions of this chapter."

The pertinent provisions of the Administrative Procedure Act, 5 U. S. C. §§ 701–706, provide:

"§ 701. Application; definitions.

"(a) This chapter applies . . . except to the extent that—

"(1) statutes preclude judicial review; or

"(2) agency action is committed to agency discretion by law. . . ."

"§ 702. Right of review.

"A person suffering legal wrong because of agency action . . . is entitled to judicial review thereof."

. . . . . .

"§ 704. Actions reviewable.

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ."

. . . . . .

"§ 706. Scope of review.

". . . The reviewing court shall—

. . . . . .

"(2) hold unlawful and set aside agency action . . . found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."

[6] The closing sentence of the opinion as originally filed on July 26, 1974, required the District Court to permit respondent "to examine the data and reports" upon which the Secretary relied. The present

We agree that 28 U. S. C. § 1337 confers jurisdiction upon the District Court to entertain respondent's suit, and that the Secretary's decision not to sue is not excepted from judicial review by 5 U. S. C. § 701 (a); rather, §§ 702 and 704 subject the Secretary's decision to judicial review under the standard specified in § 706 (2) (A). We hold, however, that the Court of Appeals erred insofar as its opinion construes § 706 (2) (A) to authorize a trial-type inquiry into the factual bases of the Secretary's conclusion that no violations occurred affecting the outcome of the election. We accordingly reverse the judgment of the Court of Appeals insofar as it directs further proceedings on remand consistent with the opinion of that court, and direct the entry of a new judgment ordering that the proceedings on remand be consistent with this opinion of this Court.

I

The LMRDA contains no provision that explicitly prohibits judicial review of the decision of the Secretary not to bring a civil action against the union to set aside an allegedly invalid election. There is no such prohibition in 29 U. S. C. § 483. That section states that "[t]he remedy provided by this subchapter for challenging an election already conducted shall be exclusive." Certain LMRDA provisions concerning pre-election conduct, 29 U. S. C. §§ 411–413 and 481 (c), are enforceable in suits brought by individual union members. Provisions concerning the conduct of the election itself, however, may be enforced only according to the post-election procedures specified in 29 U. S. C. § 482. Section 483 is thus not a prohibition against judicial review but simply

version was substituted by order dated September 3, 1974, which also added n. 17, reciting the Court of Appeals' recognition that certain data in the Secretary's files may be privileged and confidential.

underscores the exclusivity of the § 482 procedures in post-election cases.

In the absence of an express prohibition in the LMRDA, the Secretary, therefore, bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision. "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*, at 141. See also *Rusk* v. *Cort*, 369 U. S. 367, 379–380 (1962); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 410 (1971).

The Secretary urges that the structure of the statutory scheme, its objectives, its legislative history, the nature of the administrative action involved, and the conditions spelled out with respect thereto, combine to evince a congressional meaning to prohibit judicial review of his decision.[7] We have examined the materials the Secretary relies upon. They do not reveal to us any congressional purpose to prohibit judicial review. Indeed, there is not even the slightest intimation that Congress gave thought to the matter of the preclusion of judicial review. "The only reasonable inference is that the possibility did not occur to the Congress." *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 468 (1968).

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[7] We agree with the Court of Appeals, for the reasons stated in its opinion, 502 F. 2d 79, 86–88 (CA3 1974), that there is no merit in the Secretary's contention that his decision is an unreviewable exercise of prosecutorial discretion.

We therefore reject the Secretary's argument as without merit. He has failed to make a showing of "clear and convincing evidence" that Congress meant to prohibit all judicial review of his decision. In that circumstance, courts "are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes plaintiffs under the powers granted by the Congress. Leedom v. Kyne, 358 U. S. 184 . . . (1958)." *DeVito* v. *Shultz*, 300 F. Supp. 381, 382 (DC 1969) (*DeVito I*). But see *Ravaschieri* v. *Shultz*, 75 L. R. R. M. 2272 (SDNY 1970); *McArthy* v. *Wirtz*, 65 L. R. R. M. 2411 (ED Mo. 1967); *Katrinic* v. *Wirtz*, 62 L. R. R. M. 2557 (DC 1966). Our examination of the relevant materials persuades us, however, that although no purpose to prohibit all judicial review is shown, a congressional purpose narrowly to limit the scope of judicial review of the Secretary's decision can, and should, be inferred in order to carry out congressional objectives in enacting the LMRDA.

II

Four prior decisions of the Court construing the LMRDA identify the congressional objectives and thus put the scope of permissible judicial review in perspective. Congress "decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest . . . [and] decided not to permit individuals to block or delay union elections by filing federal-court suits . . . ." [8] *Calhoon* v. *Harvey*, 379 U. S.

[8] See S. Rep. No. 187, 86th Cong., 1st Sess., 7 (1959):

"In acting on this bill [S. 1555] the committee followed three principles:

"1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. . . . [I]n establishing and enforcing statutory stand-

134, 140 (1964). Congress' concern was "to settle as quickly as practicable the cloud on the incumbents' titles to office," *Wirtz* v. *Bottle Blowers Assn., supra,* at 468 n. 7, and in "deliberately [giving] exclusive enforcement authority to the Secretary . . . emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member. . . ." *Id.,* at 473–475. "[I]t is most improbable that Congress deliberately settled exclusive enforcement jurisdiction on the Secretary and granted him broad investigative powers to discharge his responsibilities, yet intended the shape of the enforcement action to be immutably fixed by the artfulness of a layman's complaint . . . . The expertise and resources of the Labor Department were surely meant to have a broader play. . . ." *Wirtz* v. *Laborers' Union,* 389 U. S. 477, 482 (1968). ". . . Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted . . . ." *Trbovich* v. *Mine Workers,* 404 U. S. 528, 532 (1972). ". . . Congress in-

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ards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.

"2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. . . .

"3. Remedies for the abuses should be direct. . . . [T]he legislation should provide an administrative or judicial remedy appropriate for each specific problem."

See also *ibid.:*

"The bill reported by the committee, while it carries out all the major recommendations of the [McClellan] committee, does so within a general philosophy of legislative restraint."

tended to prevent members from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary." *Id.*, at 536. "[T]he statute gives the individual union members certain rights against their union, and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights . . . ." *Id.*, at 538–539.

Bottle Blowers Assn. reveals two more considerations pertinent to determination of the scope of judicial review. Section 482 (b) leaves to the Secretary, in terms, only the question whether he has probable cause to believe that a violation has occurred, and not the question whether the outcome of the election was probably affected by the violation. *Bottle Blowers* construed § 482 (b), however, as conferring upon the Secretary discretion to determine both the probable violation and the probable effect. "[T]he Secretary may not initiate an action until his own investigation confirms that a violation . . . probably infected the challenged election." 389 U. S., at 472. See also *Schonfeld* v. *Wirtz*, 258 F. Supp. 705, 707–708 (SDNY 1966).

In addition, in rejecting the argument that the unlawfulness infecting a challenged election could be washed away by an intervening unsupervised union election, the Court stated, 389 U. S., at 474:

> ". . . Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election . . . was reached in light of the abuses surfaced by the extensive congressional inquiry showing how incumbents' use of their inherent advantage over potential rank and file challengers established and perpetu-

> ated dynastic control of some unions. . . . These abuses were among the 'number of instances of breach of trust . . . [and] disregard of the rights of individual employees . . .' upon which Congress rested its decision that the legislation was required in the public interest." [9]

Two conclusions follow from this survey of our decisions: (1) since the statute relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect, clearly the reviewing court is not authorized to substitute its judgment for the decision of the Secretary not to bring suit; (2) therefore, to enable the reviewing court intelligently to review the Secretary's determination, the Secretary must provide the court and the complaining witness with copies of a statement of reasons supporting his determination. "[W]hen action is taken by [the Secretary] it must be such as to enable a reviewing Court to determine with some measure of confidence whether or not the discretion, which still remains in the Secretary, has been exercised in a manner that is neither arbitrary nor capricious. . . . [I]t is necessary for [him] to delineate and make explicit the basis upon which discretionary action is taken, particularly in a case such as this where the decision taken consists of a failure to

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[9] Respondent referred at oral argument to the following statement in the Brief for United Mine Workers of America as *Amicus Curiae* 3: "The struggle by UMWA members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often, union reformers have found the Department of Labor allied with union incumbents against their interests."

No issue of this nature is raised by respondent's complaint in this case.

act after the finding of union election irregularities." *DeVito I*, 300 F. Supp., at 383; see also *Valenta* v. *Brennan*, No. C 74–11 (ND Ohio 1974).

Moreover, a statement of reasons serves purposes other than judicial review. Since the Secretary's role as lawyer for the complaining union member does not include the duty to indulge a client's usual prerogative to direct his lawyer to file suit, we may reasonably infer that Congress intended that the Secretary supply the member with a reasoned statement why he determined not to proceed. "[A]s a matter of law . . . the Secretary is not required to sue to set aside the election whenever the proofs before him suggest the suit *might* be successful. There remains in him a degree of discretion to select cases and it is his subjective judgment as to the probable outcome of the litigation that must control." *DeVito* v. *Shultz*, 72 L. R. R. M. 2682, 2683 (DC 1969) (*DeVito II*) (emphasis added). But "[s]urely Congress must have intended that courts would intercede sufficiently to determine that the provisions of Title IV have been carried out in harmony with the implementation of other provisions of [the LMRDA]." *DeVito I, supra*, at 383. Finally, a "reasons" requirement promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies, and as noted by the Court of Appeals in this case, the need to assure careful administrative consideration "would be relevant even if the Secretary's decision were unreviewable." 502 F. 2d, at 88–89, n. 14.

The necessity that the reviewing court refrain from substitution of its judgment for that of the Secretary thus helps define the permissible scope of review. Except in what must be the rare case, the court's review should be confined to examination of the "reasons" statement, and the determination whether the statement,

without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious. Thus, review may not extend to cognizance or trial of a complaining member's challenges to the factual bases for the Secretary's conclusion either that no violations occurred or that they did not affect the outcome of the election. The full trappings of adversary trial-type hearings would be defiant of congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather "to settle as quickly as practicable the cloud on the incumbents' titles to office"; and "to protect unions from frivolous litigation and unnecessary interference with their elections." "If . . . the Court concludes . . . there is a rational and defensible basis [stated in the reasons statement] for [the Secretary's] determination, then that should be an end of this matter, for it is not the function of the Court to determine whether or not the case should be brought or what its outcome would be." *DeVito II, supra,* at 2683.

Thus, the Secretary's letter of November 7, 1973, may have sufficed as a "brief statement of the grounds for denial" for the purposes of the Administrative Procedure Act, 5 U. S. C. § 555 (e),[10] but plainly it did not suffice as a statement of reasons required by the LMRDA. For a statement of reasons must be adequate to enable the court to determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all. For this essential purpose, although detailed findings of fact are not required, the statement of reasons should inform

[10] Title 5 U. S. C. § 555 (e) provides:

"Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial."

the court and the complaining union member of both the grounds of decision and the essential facts upon which the Secretary's inferences are based.

The Secretary himself suggests that the rare case that might justify review beyond the confines of the reasons statement might arise, for example, "if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogate his enforcement responsibilities . . . [or] if the Secretary prosecuted complaints in a constitutionally discriminatory manner . . . ." Brief for Petitioner 9 n. 3. Other cases might be imagined where the Secretary's decision would be "plainly beyond the bounds of the Act [or] clearly defiant of the Act." *DeVito II*, 72 L. R. R. M., at 2682. Since it inevitably would be a matter of grave public concern were a case to arise where the complaining member's proofs sufficed to require judicial inquiry into allegations of that kind, we may hope that such cases would be rare indeed.

There remains the question of remedy. When the district court determines that the Secretary's statement of reasons adequately demonstrates that his decision not to sue is not contrary to law, the complaining union member's suit fails and should be dismissed. *Howard* v. *Hodgson*, 490 F. 2d 1194 (CA8 1974). Where the statement inadequately discloses his reasons, the Secretary may be afforded opportunity to supplement his statement. *DeVito I*, 300 F. Supp., at 384; *Valenta* v. *Brennan*, *supra*.[11] The court must be mindful, however, that

[11] Judge Gesell of the District Court for the District of Columbia fashioned an acceptable procedure in *DeVito I*, 300 F. Supp. 381 (1969). Aggrieved union members complained of irregularities in the election of regular officers of the International Union. They also complained of irregularities in the election of an International President Emeritus. The office of the Secretary of Labor re-

endless litigation concerning the sufficiency of the written statement is inconsistent with the statute's goal of expeditious resolution of post-election disputes.

The district court may, however, ultimately come to the conclusion that the Secretary's statement of reasons on its face renders necessary the conclusion that his decision not to sue is so irrational as to constitute the decision arbitrary and capricious. There would then be presented the question whether the district court is empowered to order the Secretary to bring a civil suit against the union to set aside the election. We have no occasion to address that question at this time. It obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary.[12] See *Passenger*

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fused to bring suit to set aside either election, supplying separate statements of reasons in the cases. Judge Gesell determined that the statement respecting the regular election of officers was inadequate, but that the statement respecting the election of a President Emeritus was sufficient. He therefore ordered the Secretary to reopen consideration of the former complaint and to submit "a fuller statement of reasons and explanation," if on reconsideration the Secretary remained determined not to bring suit. The Secretary's motion to dismiss and for summary judgment was denied without prejudice to a further submission of reasons on that aspect of the case but was granted as respects the election of the President Emeritus. Later, following the Secretary's reconsideration of the election of the regular officers, and his adherence to his determination not to file suit, Judge Gesell conducted another hearing. *DeVito II*, 72 L. R. R. M. 2682 (DC 1969). Judge Gesell concluded on this occasion that the Secretary "satisfied the Court that there is a rational basis for his not proceeding" and granted the Secretary's motion to dismiss.

[12] USWA argues that Arts. II and III of the Constitution "do not countenance a court order requiring the executive branch, against its wishes, to institute a lawsuit in federal court." "[A] judicial direction that such an action be brought would violate the separation of powers . . . [and] because the Secretary agrees

Corp v. *Passengers Assn.*, 414 U. S. 453, 465 (1974) (BRENNAN, J., concurring); *Nader* v. *Saxbe*, 162 U. S. App. D. C. 89, 92–93, n. 19, 497 F. 2d 676, 679–680, n. 19 (1974). We prefer therefore at this time to assume that the Secretary would proceed appropriately without the coercion of a court order when finally advised by the courts that his decision was in law arbitrary and capricious.

III

The opinion of the Court of Appeals authorized review beyond the permissible limits defined in this opinion. After first stating that "judicial review of the Secretary's decision not to bring suit should extend at the very least to an inquiry into his reasons for that decision . . . ," 502 F. 2d, at 88–89, the court noted: "The relief requested by the complaint . . . however, goes beyond such an inquiry. . . . [P]laintiff seeks an opportunity to challenge the factual basis for [the Secretary's] conclusion either that no violations occurred or that they did not affect the outcome of the election." *Id.*, at 89. The court concluded that in that circumstance "plaintiff is entitled to a sufficiently specific statement of the factors upon which the Secretary relied in reaching his decision not to file suit so that plaintiff may have information concerning the allegations contained in his complaint." *Id.*, at 90.

But the key allegation of plaintiff's verified complaint is paragraph 18 which alleges: "Notwithstanding the fact that the Defendant Secretary's investigation has sub-

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with the union that Title IV does not require a new election, the lawsuit would be one lacking the requisite adversity of interest to constitute a 'case' or 'controversy' as required by Article III." Since we do not consider at this time the question of the court's power to order the Secretary to file suit, we need not address those contentions.

stantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election the Defendant Secretary refuses to file suit to set aside the election." [13] Thus the Court of Appeals' opinion impermissibly authorizes the District Court to allow respondent the full trappings of an adversary trial of his challenge to the factual basis for the Secretary's decision.

IV

The District Court, pursuant to the Court of Appeals' order of remand, ordered the Secretary to furnish a statement of reasons. The petitioner did not cross-petition from the order, and petitioner and USWA conceded that the order was proper in this case. Tr. of Oral Arg. 23–24, 52. The Secretary furnished the statement and it is attached as an Appendix to this opinion. Its adequacy to support a conclusion whether the Secretary's decision was rationally based or was arbitrary and capricious, is a matter of initial determination by the District Court.

The judgment of the Court of Appeals is reversed insofar as it directs further proceedings consistent with the opinion of the Court of Appeals, and that court is directed to enter a new order that the proceedings on remand be consistent with this opinion of this Court.

So ordered.

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[13] The Secretary concedes that, because the District Court dismissed respondent's complaint for want of "jurisdiction," all of the factual allegations of this paragraph must be accepted as true. Brief for Petitioner 4 n. 2. The allegation recites, however, only that the "Secretary's investigation has substantiated the plaintiff's allegations," and not also that the Secretary has found that the irregularities charged affected the outcome of the election. On the contrary, the reasons statement attached as the Appendix to this opinion discloses that the Secretary found that the irregularities did not affect the conduct of the election.

APPENDIX TO OPINION OF THE COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73 0954

WALTER BACHOWSKI, PLAINTIFF

v.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, and UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, DEFENDANTS

STATEMENT OF THE SECRETARY OF LABOR

On November 12, 1973, this Court, upon oral argument, dismissed the Complaint filed herein by the plaintiff, and further denied plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. On appeal, the United States Court of Appeals for the Third Circuit, in a Judgment entered on July 26, 1974, ordered that the aforementioned Judgment of the District Court be vacated and the cause remanded for further proceedings consistent with the Opinion of the Third Circuit filed on July 26, 1974, as amended September 3, 1974.

On remand, this Court ordered the Secretary of Labor to furnish a statement of the reasons and explanations underlying his decision not to file suit pursuant to the complaint received from Mr. Walter Bachowski, a member in good standing of the United Steelworkers of America, AFL–CIO–CLC (hereinafter referred to as the International).

Accordingly, defendant, Secretary of Labor, is furnishing the following information. However, it is respectfully submitted that defendant, Secretary of Labor, in

furnishing this statement does not waive any legal claims raised in connection with this matter.[1]

Pursuant to a complaint received on June 21, 1973 from Mr. Walter Bachowski, the Secretary of Labor conducted an investigation of the February 13, 1973 election conducted by the International for the office of District Director, District 20. District 20 is the fourth largest Steelworker District and covers eight contiguous counties in Western Pennsylvania, running from Pittsburgh in the South to Erie in the North, and Ohio to the West. At the time of the election, District 20 was comprised of approximately 67,419 members.

In total, the Secretary's representatives investigated 80 of District 20's 190 local unions, including all 27 of the former District 50 locals (the Secretary has found from past experience that former District 50 locals have encountered an unusual number of election related problems due to their recent assimilation into the Union). In formulating an investigative plan the Department of Labor focused upon and investigated each and every local brought to its attention by Mr. Bachowski, both orally and in his written complaint. Investigators, while in the geographical areas of the locals designated by Mr. Bachowski, reviewed additional local unions on a random basis in those areas. Also, red flag locals were selected on a district wide basis where, for example, voter turnouts appeared to be inordinately high. In addition to the 80 in depth local union investigations, investigators interviewed numerous individuals including members, union officers and Mr. Bachowski himself concerning the events surrounding the District 20 election. Investigators also reviewed and examined documentary evidence for fur-

[1] Defendant, Secretary of Labor, now has pending before the Supreme Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

ther investigative leads or potential violations. During the course of the entire proceeding, investigators worked hand in hand with Mr. Bachowski on an ongoing basis.

Because of the size of District 20 and the obvious limitations on available manpower (the Department of Labor was concurrently investigating elections conducted in five other Districts as well), it was not possible to investigate each and every local union in District 20. However, the above described investigative design was broadly conceived and was reasonably calculated to disclose all violations which may have occurred in the District wide election.

Therefore, it is readily apparent the Department conducted a thorough and exhaustive investigation into the District 20 election. Set forth below is a detailed analysis of the investigative findings, along with the numerical estimates of the votes which may have been affected as a result of these violations. In reaching these numerical estimates, we have not considered figures which constitute a reasonably probable effect, but rather, will set forth votes which have been calculated to a maximum theoretical possibility. By using these maximized figures, we are giving in most instances the benefit of the doubt to Mr. Bachowski. For example, Local Union 2789 which will be discussed herein failed to conduct an election. Thus, by assuming that the entire membership of 249 would have voted, and moreover would have voted unanimously for Mr. Bachowski, we arrived at the maximized figure for possible effect on outcome of 249 votes. This method of computation, while theoretically possible, is highly unlikely, since, for example, in the entire District only about one-third of the members voted in the election. Thus, the reasonable probability in this Local Union is that only approximately one-third of the members would have voted had there been an election, and

that those voting would not have given Mr. Bachowski an unanimity of the vote.

(1) *Local Union 2203*

The investigation in this Local Union disclosed a failure to mail a notice of the election to ten members working on one employer site, and consequently, they were never apprised of the election and did not vote. Thus, ten members were potentially denied the right to vote in this Local Union as a result of the failure to mail notice of the election as required by Section 401 (e) of the Act. In arriving at this figure of ten, we would note, however, that since only nine of the seventeen members at the other employer location voted, it seems highly unlikely that all ten members would have voted in the election had they been notified.

(2) *Local Union 2789*

The files indicate that Local Union 2789 voted at its monthly membership meeting not to conduct an election because of a lack of funds. Accordingly, no election was conducted. However, since the Local Union was obligated by law to conduct an election, it was concluded that the total membership of 249 were potentially denied the right to vote in violation of Section 401 (a) of the Act. As noted above, in computing the total number of votes that may have been affected by this violation, we have included the entire membership of the Local Union, and have further assumed that the entire membership may have voted for Mr. Bachowski.

(3) *Local Union 3186*

This Local Union failed to provide adequate safeguards to insure a fair election. For example, the persons conducting the election hand-carried ballots to members at their work stations, who were then permitted to vote.

There was no specific voting area and no voter eligibility list was used. The entire conduct of this election left a great deal to be desired. It was thus concluded that the Local Union failed to provide adequate safeguards to insure a fair election and that this violation "may have affected the outcome" of the election to the extent of 16 votes. This figure of 16 votes represents the entire margin by which Kluz prevailed over Bachowski.

(4) *Local Union 3713*

The investigation of this Local Union disclosed very loose ballot control (many ballots were found lying around the grounds of the employer), and as a result the Local was unable to account for 39 ballots. The union thus failed to provide adequate safeguards to insure a fair election and this violation "may have affected" 124 votes. This figure, as in the previous Local, represents the full margin of victory by Kluz over Bachowski.

(5) *Local Union 7496*

This Local Union, which is comprised of six members, failed to conduct an election. Our investigation disclosed that these members were eligible to vote in the election and thus, the six members were denied the right to vote in violation of Section 401 (e) of the Act. For purposes of possible effect on outcome, it is assumed that all six members would have voted had an election been conducted and that all six members would have voted for Bachowski.

(6) *Local Union 7749*

This Local Union, consisting of 25 members, failed to schedule and conduct an election. Although there appeared to be voter apathy in this Local Union, it was concluded that these 25 members had been denied the right to vote. Hence, the figure of 25 was assigned as the potential "effect on the outcome."

(7) *Local Union 12055*

The 51 members of this Local Union work at four separate employer locations. The investigative files indicated that 38 members at three of those sites were not notified of the election in violation of Section 401 (e) of the Act. In addition, the investigation disclosed that ballots were distributed and received in such a manner that secrecy could not be maintained. All 13 members voting at this location cast their ballots in favor of Kluz and thus it was considered that these 13 ballots may have been affected as a result of this violation. Thus, in this Local Union, a total potential effect on outcome of 51 votes was derived by assuming that the 38 members not notified would all have voted and cast their ballots in favor of Bachowski, and that the 13 members were influenced by the non-secret conditions to vote for Kluz.

(8) *Local Union 12059*

This Local Union consists of approximately 185 members employed at two separate locations. The investigation revealed that nine members at one of these locations were not mailed notices of the election as required. The file further revealed that these members were in fact eligible to vote. Thus, it was concluded that the outcome of this election may potentially have been affected to the extent of eight votes as a result of this violation, since one of the nine members who was not notified of the election actually voted.

(9) *Local Union 13972*

The investigative file disclosed that five members of this Local Union who were working at a plant site removed from the remainder of the local members were denied an opportunity to vote in this election. The files disclosed that the Election Committee failed to provide

facilities for these members. Thus, five votes may have been affected by the violation in this Local Union.

(10) *Local Union 14210*

A review of the investigative file in this Local Union disclosed two violations. The evidence indicated that one member was denied the right to vote; the Local failed to provide voting facilities for a member who was unable to reach the polls because of a work conflict. In addition, the evidence indicated that an ineligible member was permitted to vote in violation of Section 401 (e) of the Act. Thus, two members were potentially affected by the violations that occurred in this Local Union.

(11) *Local Union 14661*

In this Local Union, the investigation revealed that certain members marked their ballots in such proximity to the registration table that secrecy of the ballot may have been compromised. The investigation also revealed evidence that one member saw how another member voted. The result in this election was Kluz 34, Bachowski 20, and Brummitt 11. The possible effect on outcome was 14, the margin of victory by Kluz over Bachowski.

(12) *Local Union 14768*

The files reveal that although an election was conducted in this Local Union, no return sheet was submitted to the International. The evidence indicated that because the Financial Secretary thought he had not conducted the election properly, he destroyed all records and did not submit a return. Thus, the 17 members casting ballots in this election were denied a right to vote in violation of Section 401 (e) of the Act. (It should be noted that the union purports to have evidence of the actual return in this Local Union, which showed Kluz winning by one vote.)

(13) *Local Union 14800*

A review of the investigative files on Local 14800 revealed the existence of three violations. The evidence very strongly indicated that the local failed to provide adequate safeguards to insure a fair election in violation of Section 401 (c) of the Act. There was evidence that ballots were submitted for some 40 members who did not in fact vote in the election. Moreover, individuals other than election tellers had access to and handled ballots without adequate supervision. In view of the lack of adequate ballot control and the strong indication of ballot fraud in this Local Union, it was concluded by the Secretary that all 110 votes received by Kluz should be considered as possibly having been affected by this violation. (118 votes were cast in the election with Bachowski receiving 3 and Brummitt receiving 5.) The evidence also indicated that 78 members at three employer locations were not adequately notified of the election in violation of Section 401 (e) of the Act. Since 38 of these members voted, only 40 members may be considered for purposes of effect on outcome (the 38 who voted were included in the figure of 110 above). Finally, the file disclosed that funds of Local Union 14800 were expended for a campaign rally supporting the candidacy of Mr. Kluz. Evidence tends to indicate that 50 to 100 members attended the party, including some officers and members of locals other than 14800. Thus, using maximized figures, 100 votes may have been affected by this violation (in addition to the total number of members already included above). However, we would note that the union has indicated that many members attending this party were ardent Kluz supporters. Thus, the illegal expenditure would have had little effect, if any, on their voting preference. We were unable to identify the majority of the members of the party; the union contends that most of

the members in attendance were members of Local Union 14800, whose entire vote was regarded as possibly affected by other violations as noted above.

(14) *Local Union 14820*

The investigative file in this Local Union indicated that there was a failure to maintain secrecy of the ballot in violation of Section 401 (a) of the Act, as well as a failure to adequately notify members of the election in violation of Section 401 (e) of the Act. The investigation disclosed that 22 ballots cast in this election were signed on the back by the voting member—an obvious violation of secrecy. Although officers of the Local claim they were not aware of this until a subsequent review of the ballots with a Department of Labor investigator, this does not cancel the violation, which may have affected 22 votes. The evidence also indicated 39 members at two employer sites were not notified of the election. Assuming that all 39 would have voted and that they would have cast their votes for Bachowski, 39 votes may have been affected by this violation. Finally, the file disclosed that through inaccurate tallies by the responsible local union officers, Bachowski received one less vote than his entitlement while Kluz received one additional vote. Hence, an extra two votes must be considered as having been affected by the Local's failure to properly credit the votes to the proper candidates.

(15) *Local Union 14945*

The investigative file in this Local Union revealed that ballots were marked on tables by voters in close proximity who were able to observe how other members were voting their ballots. Thus, the Local failed to observe secrecy of the ballot as required by Section 401 (c) of the Act. Since the margin of victory by Kluz over

Bachowski was 18, 18 votes may have been affected by the existence of this violation.

(16) *Local Union 15370*

This Local Union failed to provide adequate safeguards to insure a fair election in that the ballot control was less than desirable. Persons not authorized handled ballots at one or more times throughout the period of the election. Although additional investigation failed to disclose any evidence that would indicate other irregularities such as fraud or ineligible members voting, it was nevertheless concluded that this lack of adequate safeguards may have affected ten members in this local—the margin of votes achieved by Kluz over Bachowski.

(17) *Local Union 15420*

Evidence disclosed that this Local Union failed to maintain adequate safeguards to insure a fair election. Union records indicated that Kluz received 15 votes, Bachowski none, and Brummitt one. However, the Secretary's investigation revealed that only 13 members were listed as voting. It was also learned that this local did not maintain adequate control of the ballots a fact which may in no small part account for the deviation between the number of votes indicated as having been cast and the number of members actually voting. Thus, the Secretary of Labor concluded that all 16 members voting in this election may have been affected by the local's failure to provide adequate safeguards to insure a fair election.

To recapitulate, we are setting forth below a list of the Locals in which violations occurred and the votes which may potentially have been calculated to a theoretical probability and represent the maximum number of votes involved.

1. Local Union 2203 — 10 votes
2. Local Union 2789 —249 votes
3. Local Union 3186 — 16 votes
4. Local Union 3713 —124 votes
5. Local Union 7496 — 6 votes
6. Local Union 7749 — 25 votes
7. Local Union 12055— 51 votes
8. Local Union 12059— 8 votes
9. Local Union 13972— 5 votes
10. Local Union 14210— 2 votes
11. Local Union 14661— 14 votes
12. Local Union 14768— 17 votes
13. Local Union 14800—250 votes
14. Local Union 14820— 63 votes
15. Local Union 14945— 18 votes
16. Local Union 15370— 10 votes
17. Local Union 15420— 16 votes

By adding the total of the votes set forth in the local unions above, the election for the position of District Director, District 20, may theoretically have been affected by violations disclosed through investigation to the extent of 884 votes. Since the margin of victory by which Mr. Kluz prevailed over Mr. Bachowski was 907 votes[2] it was the Secretary of Labor's conclusion that the violations which occurred could not have affected the outcome of the election. Moreover, we would note the Secretary like any other litigant must be cognizant of all factors entering into prosecution of a Title IV case. In this regard, the union has raised serious question concerning Bachowski's invocation of his internal union remedies, notably his failure to carry a complaint to the

[2] The results in the election for the position of District Director, District 20 were as follows: Kluz—10,558 votes; Bachowski—9,651 votes; Brummitt—3,566 votes.

International Tellers whose function is to rule initially upon the validity of election protests. Mr. Bachowski chose to bypass this step and to carry his protest directly to the Executive Board.

The plaintiff has correctly alleged in this complaint and the Secretary has confirmed through investigation, that certain violations of Title IV occurred in the election for District Director for District 20. However, the Secretary concluded, after review of the investigative findings that the votes which may have been affected by the violations could not have altered the outcome of the election. In *Wirtz* v. *Local 153, Glass Bottle Blowers Association,* 389 U. S. 463 (1968) the Supreme Court noted at page [472] that:

> The Secretary may not initiate an action until his own investigation confirms that a violation of section 401 *probably infected* the challenged election. (Emphasis added.)

Thus, the finding of violations by the Secretary of Labor does not mature into an actionable case unless he has evidence that such violations "probably infected" the election in question. In this case, the Secretary found violations, but concluded that they did not affect the outcome of the election.

CONCLUSION

The extensive investigation conducted by the Department of Labor focused, among other things, on all the specific matters raised by Mr. Bachowski. As has been shown above, certain violations were disclosed in the conduct of this election, however, these violations could not have affected its outcome. Therefore, it is submitted that the Secretary of Labor in arriving at his determination not to file suit to set aside the District 20 election

properly discharged his statutory duties under Title IV of the Act.

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Filed: November 11, 1974.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court with the understanding that the Court has fashioned an exceedingly narrow scope of review of the Secretary's determination not to bring an action on behalf of a complainant to set aside an election. The language and purposes of § 401 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 532, 29 U. S. C. § 481, have required the Court to define a scope of review much narrower than applies under 5 U. S. C. § 706 (2)(A) in most other administrative areas. The Court's holding must be read as providing that the determination of the Secretary not to challenge a union election may be held arbitrary and capricious only where the Secretary's investigation, as evidenced by his statement of reasons, shows election ir-

regularities that affected its outcome as to the complainant, *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 472 (1968), and that notwithstanding the illegal conduct so found the Secretary nevertheless refuses to bring an action and advances no rational reason for his decision.

MR. JUSTICE REHNQUIST, concurring in the result in part and dissenting in part.

The parties to this case will have to be excused if they react with surprise to the opinion of the Court. Instead of deciding the issue presented in the Secretary of Labor's petition for certiorari, the Court decides an issue about which the parties no longer disagree; to compound the confusion, the reasoning adopted by the Court to resolve the issue it does decide is quite unusual unless it is intended to foreshadow disposition of the issue upon which the Court purports to reserve judgment.

I

After exhausting intraunion remedies, respondent filed a complaint with the Secretary of Labor alleging violations of § 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 532, 29 U. S. C. § 481. The Secretary conducted an investigation and concluded that no civil action to set aside the challenged election was warranted. Respondent was so notified,* and he then sought to challenge the Secretary's

*Respondent was notified by telephone that the Secretary had decided not to file suit to set aside the election. App. 5A. On the day respondent filed his complaint, the Labor Department sent him a letter notifying him of the Secretary's decision in the following manner:

"Pursuant to Sections 402 and 601 of the Act, an investigation was conducted by this Office. Based on the investigative findings, it has been determined, after consultation with the Solicitor of

refusal to file suit. The complaint alleged that the Secretary had refused to file suit, "[n]otwithstanding the fact that the Defendant Secretary's investigation has substantiated the [respondent's] allegations," and that respondent "has not been given a statement of reasons why the Defendant Secretary will not file suit." App. 5A. Respondent asked the court to order the Secretary to file suit to set aside the election and "direct the Defendant Secretary to make available for examination by the [respondent] all evidence it has obtained concerning its investigation of the aforesaid election." *Id.*, at 6A. The Court of Appeals, reversing the District Court, held that the Secretary's refusal to file an action to set aside the election was judicially reviewable. In considering "the proper scope of such judicial review," the Court of Appeals concluded that the Secretary should prepare a statement of reasons, presumably to assist in judicial review and also to ensure that proper deference was paid to the Secretary's determinations. 502 F. 2d 79, 88–89 (CA3 1974).

Notwithstanding contrary verbiage, the approach of this Court is not materially different. The Court expressly reserves "the question whether the district court is empowered to order the Secretary to bring a civil suit against the union to set aside the election," *ante*, at 575, but its justification for ordering the Secretary to provide a statement of reasons appears premised upon an affirmative disposition of the reserved question: the Secretary must provide a statement of reasons "to enable the reviewing court intelligently to review the Secretary's determination," *ante*, at 571. I cannot subscribe to judicial reasoning of this convoluted sort.

Labor, that civil action to set aside the challenged election is not warranted. We are, therefore, closing our file in this case as of this date." Brief for Respondent 1a.

II

In the first place, whether or not a statement of reasons must be supplied by the Secretary is not an issue presented by this case. The single question presented by the Secretary's petition for certiorari is:

> "Whether a disappointed union office seeker may invoke the judicial process to compel the Secretary of Labor to bring an action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election." Pet. for Cert. 2.

The Secretary did not seek review of the holding by the Court of Appeals that a statement of reasons was required but instead proceeded to comply with that portion of the appellate court's holding by filing the statement of reasons that is appended to the opinion of the Court. As the Secretary states: "We do not contest this portion of the court's holding." Brief for Petitioner 5 n. 2.

Such a concession appears well founded, although not for the reasons stated by the Court. Independent of any connection with judicial review, a statement of reasons is required by statute. The Administrative Procedure Act (APA), which is applicable to the LMRDA, 29 U. S. C. § 526, states:

> "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." 5 U. S. C. § 555 (e).

See S. Doc. No. 248, 79th Cong., 2d Sess., 206, 265 (1946). Here, where the Secretary is charged with the

responsibility of enforcing the rights of individual union members and has established a procedure for the filing of a complaint with him by such members, § 555 (e) would appear to be applicable.

The acquiescence of the Secretary has removed this issue from the case. Since the majority persists in deciding it, I concur in the result on the basis of the APA, which is not dependent upon the availability of judicial review. This ground, in my view, furnishes a sounder reason for concluding that a statement of reasons must be furnished than does the reasoning of the Court.

III

It remains to consider the only question presented by the Secretary's petition for certiorari: Is judicial review available at the behest of respondent to force the Secretary to file a civil action to set aside the union election?

Respondent does not rely upon any provision of the LMRDA as authorizing this post-election lawsuit, for indeed there is none. Instead, respondent relies upon the APA judicial-review provisions, 5 U. S. C. §§ 701–706. App. 3A. The judicial-review provisions of the APA do not apply, however, "to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U. S. C. § 701 (a).

I agree with the Court that 29 U. S. C. § 483 does not preclude judicial review of the kind sought in this case. That section expresses the congressional judgment that the civil action filed by the Secretary under 29 U. S. C. § 482 (b) shall be the exclusive remedy "for challenging an election already conducted." Respondent recognizes that this Court's decision in *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), precludes him from proceeding directly

against the union, a result that I believe is compelled by § 483. But § 483 is silent about the availability of relief to force the Secretary to pursue the remedy that is exclusively his, and under this Court's decisions a prohibition of judicial review is not to be lightly inferred. *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 140–141 (1967).

I reach a contrary conclusion, however, with regard to the second clause of § 701 (a). It seems to me that prior decisions of this Court establish that the Secretary's decision to file or not to file a complaint under § 482 is precisely the kind of "agency action . . . committed to agency discretion by law" exempted from the judicial-review provisions of the APA.

In LMRDA cases, this Court has repeatedly recognized the exclusive role in post-election challenges played by the Secretary. In *Calhoon* v. *Harvey, supra,* at 140–141 (footnote omitted), we said:

> "Section 402 of Title IV, as has been pointed out, sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the *special knowledge and discretion* of the Secretary of Labor in order best to serve the public interest. . . . In so doing Congress, with one exception not here relevant, decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. *Reliance on the discretion of the Secretary* is in harmony with the general congressional policy to allow

unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts. Without setting out the lengthy legislative history which preceded the passage of this measure, it is sufficient to say that we are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." (Emphasis added.)

See also *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S. 463, 473–474 (1968). More recently, in *Trbovich* v. *Mine Workers*, 404 U. S. 528 (1972), we said, in the context of claims presented by an intervenor that had not been included in the Secretary's complaint:

"With respect to litigation by union members, then, the legislative history supports the conclusion that Congress intended to prevent members from pressing claims *not thought meritorious by the Secretary*, and from litigating in forums or at times different from those chosen by the Secretary. . . .

. . . . . .

". . . [W]e think Congress intended to insulate the union from *any complaint that did not appear meritorious to both a complaining member and the Secretary*. Accordingly, we hold that in a post-election enforcement suit, Title IV imposes no bar to intervention by a union member, so long as that intervention is limited to the claims of illegality presented by the Secretary's complaint." *Id.*, at 536–537 (footnote omitted; emphasis added).

The exclusivity of the Secretary's role in the enforcement of Title IV rights is no accident. It represents a conscious legislative compromise adopted to balance two important but conflicting interests: vindication of the rights of union members and freedom of unions from undue harassment. See *Bottle Blowers, supra,* at 470–471. This Court has recognized unreviewable discretion both in the labor area, *Vaca* v. *Sipes,* 386 U. S. 171, 182 (1967), and in other civil areas, *The Confiscation Cases,* 7 Wall. 454 (1869); *FTC* v. *Klesner,* 280 U. S. 19, 25 (1929). The Court of Appeals sought to distinguish this line of cases on the grounds that it involved "vindication of societal or governmental interest, rather than the protection of individual rights," 502 F. 2d, at 87. While the Secretary points out the artificiality of this purported distinction and refutes it as applied to these cases, Brief for Petitioner 30, a more basic response is that such considerations provide no basis for contravention of legislative intent:

> "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 301 (1943).

The Court recognizes the power of these arguments, if only by understatement, when it acknowledges that any argument for judicial review of the Secretary's determination "obviously presents some difficulty in light of the strong evidence that Congress deliberately gave exclusive enforcement authority to the Secretary." *Ante,* at 575 (footnote omitted). In my view the parties to this

litigation are entitled to adjudication of the issue upon which this Court granted certiorari. I would accordingly reverse the judgment of the Court of Appeals insofar as it held that the Secretary's refusal to institute an action under 29 U. S. C. § 482 is judicially reviewable under the provisions of the APA, 5 U. S. C. §§ 701–706.

Syllabus

UNITED STATES *v.* TAX COMMISSION OF MISSISSIPPI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 74-548. Argued April 22, 1975—Decided June 2, 1975

A Mississippi Tax Commission regulation requires out-of-state liquor distillers and suppliers to collect from military installations within Mississippi, and remit to the Commission, a tax in the form of a wholesale markup on liquor sold to the installations. The United States has four military installations in Mississippi, exercising exclusive jurisdiction over two and concurrent jurisdiction over the other two. The United States paid under protest the markup on liquor purchased from out-of-state distillers by the various nonappropriated fund activities at these installations, and brought action to have the regulation declared unconstitutional and for other relief. After this Court's reversal of a three-judge District Court's opinion denying relief, *United States* v. *Mississippi Tax Comm'n*, 412 U. S. 363, that court on remand again denied relief. *Held:* Viewing the markup as a sales tax, the legal incidence of the tax rests upon instrumentalities of the United States as the purchasers, *First Agricultural Nat. Bank* v. *Tax Comm'n*, 392 U. S. 339, and hence the markup is unconstitutional as a tax imposed upon the United States and its instrumentalities, *McCulloch* v. *Maryland*, 4 Wheat. 316. Pp. 604–614.

(a) Since the legal incidence of the tax is upon the United States, in view of the requirement of the regulation that the tax be passed on to the purchaser, the federal immunity with respect to sales of liquor to the two exclusively federal enclaves is preserved by § 107 (a) of the Buck Act. Under that provision § 105 (a) of the Act, which precludes any person from being relieved of any state sales or use tax on the ground that the sale or use occurred in whole or in part within a federal area, "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof." Pp. 611–613.

(b) The Twenty-first Amendment did not abolish federal immunity with respect to taxes on the sales of liquor to the concurrent

jurisdiction bases. Cf. *United States* v. *Mississippi Tax Comm'n*, *supra*. Pp. 613–614.

378 F. Supp. 558, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. DOUGLAS and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 615.

Stuart A. Smith argued the cause for the United States. With him on the briefs were *Solicitor General Bork*, *Assistant Attorney General Crampton*, *Mark L. Evans*, *Jonathan S. Cohen*, and *Richard Farber*.

Robert L. Wright argued the cause for appellees. With him on the brief was *A. F. Summer*, Attorney General of Mississippi.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Regulation 25 of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect from military installations within Mississippi, and remit to the Commission, a tax in the form of a wholesale markup of 17% to 20% on liquor sold to the installations.[1] The United States has four military in-

**Andrew P. Miller*, Attorney General, *Anthony F. Troy*, Deputy Attorney General, and *William P. Bagwell, Jr.*, Assistant Attorney General, filed a brief for the Commonwealth of Virginia as *amicus curiae* urging affirmance.

[1] Regulation 25 provides:

"Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a dis-

stallations in the State. Exclusive federal jurisdiction is exercised over two of the installations, Keesler Air Force Base and the Naval Construction Battalion Center.[2] The United States and Mississippi exercise concurrent jurisdiction over the other two installations, Columbus Air Force Base and Meridian Naval Air Station. The issue presented on this appeal is whether Regulation 25 imposes an unconstitutional state tax upon these federal instrumentalities.

I

The controversy between the United States and the Tax Commission over Regulation 25 is here for the sec-

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tiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

"All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month."

[2] The United States acquired exclusive jurisdiction over the lands composing Keesler Air Force Base under the terms of § 1, 84 Stat. 835, 40 U. S. C. § 255, in a series of letters between the Governor of Mississippi and the Secretary of War. On January 9, 1945, Secretary of War Stimson wrote Governor Bailey acknowledging the acquisition of exclusive jurisdiction as required by § 255: "Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of Mississippi, title to which has heretofore vested in the United States, and over which exclusive jurisdiction has not heretofore obtained." In 1942 and 1943, the Secretary of the Navy filed Declarations of Taking in three separate actions in the United States District Court for the Southern District of Mississippi to acquire the lands for the Naval Construction Battalion Center. In accordance with the requirement of § 255, the Department of the Navy formally accepted exclusive jurisdiction over these lands in two letters to the Governor dated December 14, 1942, and January 6, 1944.

ond time. Shortly after adoption of the Regulation, the United States asserted before the Commission that the markup was unconstitutional as a tax upon federal instrumentalities, and proposed an escrow account for the amount of the tax pending a judicial determination of its legality. The Commission refused and advised out-of-state distillers by letter that the markup "must be invoiced to the Military and collected directly from the Military . . ." or the distillers would face criminal prosecution and delistment of their authority to sell liquor in Mississippi. The United States thereupon paid the markup under protest and brought this action in the District Court for the Southern District of Mississippi. The complaint sought a declaratory judgment that Regulation 25 imposed an unconstitutional tax on federal instrumentalities, an injunction against its enforcement, and a refund of the sums paid under protest.[3] The Tax Commission moved for summary judgment. A three-judge District Court granted the Commission's motion. 340 F. Supp. 903 (1972). The District Court concluded that despite Art. I, § 8, cl. 17, of the Constitution,[4] the Twenty-first Amendment permitted the Tax Commission to apply the markup to out-of-state purchases destined for nonappropriated fund activities on the two installations, Keesler and the Naval Construction Battalion Center, over which the United States exercises

[3] The parties stipulated that the amount of markups paid by nonappropriated fund activities on the four military installations from September 1966 through July 31, 1971, totaled $648,421.92. Counsel for the United States estimated that by now this amount has doubled. Tr. of Oral Arg. 6.

[4] Article I, § 8, cl. 17, provides:

". . . Congress shall have Power . . . [t]o exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings."

exclusive jurisdiction, and that therefore, *a fortiori*, the liquor sales made on the two bases over which the United States and Mississippi exercise concurrent jurisdiction, Meridian and Columbus, are similarly subject to the Mississippi tax. We reversed and remanded for further proceedings. We held that the court erred in ruling that the Twenty-first Amendment empowered the Tax Commission to apply the markup to transactions between out-of-state distillers and nonappropriated fund activities on the two exclusively federal enclaves, and held that this conclusion also eliminated the essential premise of the District Court's decision concerning the two concurrent jurisdiction bases. 412 U. S. 363 (1973).

There were, however, other issues addressed to Regulation 25 that had not been reached by the District Court. We therefore remanded the case for that court's initial consideration and determination of the issues. In respect to the two exclusively federal enclaves, the Tax Commission argued that the markup might properly be viewed as a sales tax, and that the United States had consented to the imposition of such a "tax" under the Buck Act of 1940, now 4 U. S. C. §§ 105–110. Section 105 (a) provides that no person may be relieved of any sales or use tax levied by a State on the ground that the sale or use occurred in whole or part within a federal area. But § 107 (a) provides that § 105 (a) "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ." We directed that, upon remand, the District Court address and determine the questions whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105 (a), and, if so, whether the exception contained in § 107 (a) nevertheless preserves the federal immunity with respect to transactions with nonappropriated fund activities on the two exclusively federal enclaves. 412 U. S., at 378–379.

The Buck Act questions are irrelevant to the markup as applied to the two concurrent jurisdiction bases, and, therefore, the United States argued that the markup is a tax upon instrumentalities of the United States that is unconstitutional under *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). We directed that the District Court also address and decide the instrumentality argument on remand. 412 U. S., at 380–381.[5]

II

On the remand the District Court held, as to the exclusively federal enclaves, that the markup constituted a "sales or use tax" within the meaning of § 105 (a) of the Buck Act, and that the exception in § 107 (a) for taxes upon federal instrumentalities was inapplicable because Regulation 25 imposes the legal incidence of the tax upon the distillers, and not upon any federal instrumentality, 378 F. Supp. 558, 570–573 (1974). For the same reason, the District Court held that the tax upon the sales to the two concurrent jurisdiction bases was not an unconstitutional tax upon instrumentalities of the United States. *Id.*, at 569. We again noted probable jurisdiction, 419 U. S. 1104 (1975). We reverse.

III

The exception in § 107 (a) is plainly a congressional preservation of federal immunity from any state tax that

[5] The District Court was also directed on remand to determine the merits of the Government's argument that Regulation 25 was invalid under the Supremacy Clause because it constituted an attempt by the State to interfere with federal procurement regulations and policy, see 32 CFR § 261.4 (c) (1974), established by the Secretary of Defense pursuant to authority granted him by Congress. The District Court rejected the argument as without merit. 378 F. Supp. 558, 570–573 (1974). In light of our decision, we have no occasion to determine whether the District Court was correct.

would violate the principle of *McCulloch* v. *Maryland*, *supra*, prohibiting state taxation of instrumentalities of the United States. If Regulation 25 is invalid under that principle, it is invalid in its imposition of the markup upon all out-of-state purchases, both those destined for the nonappropriated fund activities on the exclusive jurisdiction bases, and those destined for those activities on the concurrent jurisdiction bases. We therefore turn to our reasons for concluding that Regulation 25 is an unconstitutional tax upon instrumentalities of the United States.

Before 1966, Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, however, the state legislature enacted the "Local Option Alcoholic Beverage Control Law," Miss. Code Ann. § 67–1–1 *et seq.*, which created the State Tax Commission as the sole importer and wholesaler of alcoholic beverages, not including malt liquor, in the State, Miss. Code Ann. § 67–1–41. The statute authorized the Tax Commission to purchase intoxicating liquors and sell them "to authorized retailers within the state including, at the discretion of the commission, any retail distributors operating within any military post . . . within the boundaries of the state, . . . exercising such control over the distribution of alcoholic beverages as seem[s] right and proper in keeping with the provisions and purposes of this chapter." *Ibid.* The legislature also directed the Commission to add to the cost of all alcoholic beverages a price markup designed to cover the cost of operation of the wholesale liquor business, yield a reasonable profit, and keep Mississippi's liquor prices competitive with those of neighboring States, Miss. Code Ann. § 27–71–11. Generally, the wholesale markup was 17% on distilled spirits and 20% on wine.

Pursuant to its statutory authority the Commission

promulgated Regulation 25 which gave post exchanges, officers' clubs, ship's stores, and other nonappropriated fund activities operating on military installations within Mississippi the option of purchasing alcoholic beverages directly from out-of-state distillers or from the Commission. The Regulation requires that orders from distillers bear the usual price markup as charged by the Commission on its sales, which the distiller in turn must remit to the Commission or face a fine, imprisonment, or delisting, *i. e.,* withdrawal of the privilege of distributing alcoholic beverages to the Commission for resale in Mississippi. See, *e. g.,* Miss. Code Ann. § 27–71–23. The various nonappropriated fund activities at the four military installations in Mississippi all chose to purchase their alcoholic beverages directly from out-of-state distillers, and thereby continued the practice begun when Mississippi was a "dry" State.

The District Court correctly determined that post exchanges and similar facilities are instrumentalities of the United States: "it is clear that the ship's stores, officers' clubs and post exchanges 'as now operated are arms of the government deemed by it essential for the performance of governmental functions . . . and partake of whatever immunities it may have under the constitution and federal statutes.' " 378 F. Supp., at 562–563. See also *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942); cf. *Paul* v. *United States,* 371 U. S. 245, 261 (1963). The District Court also correctly held that the markup constitutes a tax on the purchases made by the nonappropriated fund activities from out-of-state suppliers. The markup can only be understood as an "enforced contribution to provide for the support of government," the standard definition of a tax. *United States* v. *La Franca,* 282 U. S. 568, 572 (1931). The District Court held, however, that federal immunity from state taxation extends only to "a

state tax whose legal, as opposed to purely economic, incidence falls upon the federal government, its property or its instruments . . . ." 378 F. Supp., at 566.

In determining that the legal incidence of the Mississippi wholesale markup fell not upon the Federal Government but upon the out-of-state distillers, the District Court defined legal incidence as "the legally enforceable, unavoidable liability for nonpayment of the tax." *Ibid.* That was error. The Tax Commission, of course, has not attempted to collect the markup directly from the nonappropriated fund activities, but has instead compelled out-of-state suppliers to collect the markup for it. But that fact alone is not determinative that the markup is a tax on the suppliers rather than on the instrumentalities of the United States. In *First Agricultural Nat. Bank* v. *Tax Comm'n,* 392 U. S. 339 (1968), we squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment. Massachusetts imposed a sales and use tax on purchases of tangible personal property, including purchases by national banks for their own use. The statute directed that " 'each vendor in this commonwealth *shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed . . . .*' " *Id.,* at 347. Like the District Court here, the Supreme Judicial Court of Massachusetts stated: "The legal incidence of a tax [is] . . . determined by 'who is responsible . . . for payment to the state of the exaction.' " 353 Mass. 172, 177, 229 N. E. 2d 245, 249 (1967). Accordingly, the state court held that the legal incidence of the tax was on the vendor. We reversed, stating: "It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. . . . There can be no doubt from the clear wording of the

statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." 392 U. S., at 347–348. See also *Gurley* v. *Rhoden, ante,* p. 200.

We see no difference between this markup and a sales tax which must be collected by the seller and remitted to the State. The Tax Commission would distinguish *First Agricultural Nat. Bank* on the ground that because the immunity of the national bank from state taxation in all but a few closely defined areas was conferred by statute, c. 267, 42 Stat. 1499, as amended, 12 U. S. C. § 548, the Court did not decide "the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities." 392 U. S., at 341. But the controlling significance of *First Agricultural Nat. Bank* for our purposes is the test formulated by that decision for the determination where the legal incidence of the tax falls, namely, that where a State requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser.[6] That is plainly the requirement of Regulation 25. Regulation 25 provides that all direct orders by military facilities of alcoholic beverages from distillers "shall bear the usual wholesale

[6] See also *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941). North Dakota imposed a sales tax and required retailers to add the tax to the sales price of goods, " 'and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. . . .' " *Id.*, at 97. A lumber company attempted to collect this tax from a national bank. *Bismarck* held that the requirement that the vendor pass on the tax placed the legal incidence on the purchaser, which was congressionally immunized from state taxation. *Id.*, at 99. Cf. *National Bellas Hess, Inc.* v. *Department of Revenue,* 386 U. S., 753, 757 n. 9 (1967).

markup in price," that the "price of such alcoholic beverages shall be paid by such organizations directly to the distiller," and that the distiller "shall in turn remit the wholesale markup" to the Tax Commission.[7] The Tax Commission clearly intended—indeed, the scheme unavoidably requires—that the out-of-state distillers and suppliers pass on the markup to the military purchasers. And to underscore this conclusion, the Director of the Alcoholic Beverage Control Division of the Tax Commission informed the distillers by letter that the wholesale markup "must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base," warning that any distiller who sells alcoholic beverages to the military without "collecting said fee directly from said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto," and subject to the penalties provided, including delisting. Plainly that ruling explicitly imposes the legal incidence of the tax upon the military.[8]

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[7] The Mississippi state courts have not passed upon the matter of the legal incidence of the tax under Regulation 25, cf. *American Oil Co.* v. *Neill*, 380 U. S. 451, 455–456 (1965); *Gurley* v. *Rhoden*, *ante*, p. 200, and, in any event, "the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121 (1954).

[8] The District Court's view that because "Mississippi's ABC [Alcoholic Beverage Control] Act and regulations do not impose any sanctions on the vendor if he absorbs all or any portion of the markup's economic burden," the Regulation does not actually require the passing on of the tax, 378 F. Supp., at 567, is without merit by virtue of *First Agricultural Nat. Bank*. "We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor." 392 U. S., at 348. Indeed, the Tax Commission letter to the distillers threatens sanctions:

Kern-Limerick, Inc. v. *Scurlock*, 347 U. S. 110 (1954); and *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), buttress our conclusion. *Kern-Limerick* held unconstitutional, as regards sales to the United States, a state sales tax statute which purported to tax the seller, but provided that the seller " 'shall collect the tax levied hereby from the purchaser.' " 347 U. S., at 111. Similarly, the Alabama statute in *King & Boozer* required the seller to pay the sales tax, but also required him " 'to add to the sales price and collect from the purchaser the amount due by the taxpayer on account of said tax.' " 314 U. S., at 7. We held that the statute, by requiring the passing on of the tax and its collection from the purchaser, placed the legal incidence of the tax on the purchaser.

We hold, therefore, that viewing the markup as a sales tax, the legal incidence of that tax was intended to rest upon instrumentalities of the United States.[9] We turn therefore to consideration of the question

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"Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without . . . collecting said fee directly from the said Military organization shall be in violation" of the statute and subject to its penalties, including delisting. Finally, even in the absence of this clear statement of the Tax Commission's intentions, obviously economic realities compelled the distillers to pass on the economic burden of the markup.

[9] *Polar Co.* v. *Andrews*, 375 U. S. 361 (1964), relied upon by appellees, is not contrary. That case involved a Florida tax upon the seller's activity of processing or bottling milk for sale on enclaves over which the Federal Government exercised exclusive jurisdiction. The tax was not a sales tax and there was no requirement that the amount of the tax be passed on to the federal purchasers. See also *Gurley* v. *Rhoden*, *ante*, p. 200, holding that the legal incidence of federal and state excise taxes on gasoline was on the producer-distributor of the gasoline who was not required to pass on the amount of the tax to his purchasers. And see *American Oil Co.* v. *Neill*, 380 U. S. 451 (1965); *Norton Co.* v. *Department of Revenue*, 340 U. S. 534 (1951).

whether the Buck Act is of assistance to the Tax Commission in its attempt to enforce Regulation 25.

IV

The Buck Act was enacted in 1940 [10] to bar the United States, among other things, from asserting immunity from state sales and use taxes on the ground that "the Federal Government has exclusive jurisdiction over the area where the transaction occurred." S. Rep. No. 1625, 76th Cong., 3d Sess., 2 (1940). Section 105 (a) of the Buck Act provides:

> "No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

The District Court concluded that under this section "Congress has legislatively acceded to Mississippi's markup on . . . wholesale liquor transactions." 378 F. Supp., at 562.

Section 107 (a) of the Buck Act, however, contains a limitation upon the application of § 105 (a). It provides that § 105 (a) "shall not be deemed to authorize the levy or collection of any tax on or from the United

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[10] Act of Oct. 9, 1940, c. 787, 54 Stat. 1059, codified as 4 U. S. C. § 105 *et seq.* by Act of July 30, 1947, § 105 *et seq.*, 61 Stat. 644.

States or any instrumentality thereof . . . ." [11] Although the District Court recognized that § 107 (a) "limits" § 105 (a), the court held that § 107 (a) was inapplicable in light of its holding that the legal incidence of the tax was on the distillers. Our reversal of the District Court in that respect and our holding that the legal incidence of the tax is upon the United States plainly brings § 107 (a) into play. The section can only be read as an explicit congressional preservation of federal immunity from state sales taxes unconstitutional under the immunity doctrine announced by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). "[U]nshaken, rarely questioned, . . . is the principle that possessions, institutions, and activities of the Federal Government itself in the absence of express congressional consent are not subject to any form of state taxation." *United States* v. *County of Allegheny*, 322 U. S. 174,

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[11] The legislative history associated with the amendment of § 107 in 1954 describes the purpose of the section as follows: "Section 107 sets up certain exceptions to the power of States to tax in [federal] areas . . . ." See H. R. Rep. No. 1981, 83d Cong., 2d Sess., 2 (1954). See also S. Rep. No. 2498, 83d Cong., 2d Sess., 3 (1954).

Section 107 (a) provides: "The provisions of [§ 105 of this Act] shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser," 4 U. S. C. § 107 (a). An "authorized purchaser" is defined in § 107 (b) as one who buys goods from military commissaries, ship's stores, or similar voluntary unincorporated organizations. 4 U. S. C. § 107 (b), as amended, Act of Sept. 3, 1954, § 4, 68 Stat. 1227. There is no question that the portion of § 107 (a) dealing with a tax on or from the United States or any instrumentality thereof was intended to be distinct from the remaining portion of the section dealing with taxes on goods sold to an "authorized purchaser." See S. Rep. No. 1625, 76th Cong., 3d Sess., 3–4 (1940).

177 (1944). See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S., at 117–118.[12] Regulation 25 is therefore outside the coverage of § 105 (a) and the markup is unconstitutional as a tax imposed upon the United States and its instrumentalities.

Nor does the Twenty-first Amendment require a different result. When the case was last here we held that "the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction [pursuant to Art. I, § 8, cl. 17, of the Constitution]." 412 U. S., at 375; see *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, 538 (1938). Cf. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140 (1937). We reach the same conclusion as to the concurrent jurisdiction bases to which Art. I, § 8, cl. 17, does not apply: "Nothing in the language of the [Twenty-first] Amendment nor in its history leads to [the] extraordinary conclusion" that the Amendment abolished federal immunity with respect to taxes on sales of liquor to the military on bases where the United States and Mississippi exer-

[12] *Polar Co.* v. *Andrews*, *supra*, does not support the Tax Commission's argument under the Buck Act. In *Polar*, the Court rejected an attack by milk producers upon a Florida gallonage tax imposed upon milk distributed by them, including milk sold to military bases located within the State. As to the sales to the military bases, over which the United States exercised exclusive jurisdiction, the Court indicated that consent to the imposition of the tax was to be found in § 105 of the Buck Act. But the Court specifically distinguished situations, such as that presented here, where the tax falls "upon the facilities of the United States or upon activities conducted within these facilities . . . ." 375 U. S., at 382. Rather, it pointed out that the "incidence of the tax appears to be upon the activity of processing or bottling milk in a plant located within Florida, and not upon work performed on a federal enclave or upon the sale and delivery of milk occurring within the boundaries of federal property." *Ibid.*

cise concurrent jurisdiction. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341, 345–346 (1964); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964). *James Beam* involved a Kentucky tax upon the importation into that State of whiskey produced in Scotland and transported through the United States directly to bonded warehouses in Kentucky. The Court held that the tax was prohibited by the Export-Import Clause of the Constitution, Art. I, § 10, cl. 2, and that the Amendment had not repealed that clause:

> "To sustain the tax which Kentucky has imposed in this case would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion. This Court has never intimated such a view, and now that the claim for the first time is squarely presented, we expressly reject it." 377 U. S., at 345–346.

Hostetter held that the Twenty-first Amendment did not supersede the Commerce Clause, Art. I, § 8, cl. 3, so as to permit the State of New York to prohibit the sale of liquor, under the supervision of United States Customs, to departing international airline passengers. We said that "[s]uch a conclusion would be patently bizarre and is demonstrably incorrect." 377 U. S., at 332. Similarly, it is a "patently bizarre" and "extraordinary conclusion" to suggest that the Twenty-first Amendment abolished federal immunity as respects taxes on sales to the bases where the United States and Mississippi exercise concurrent jurisdiction, and "now that the claim for the first time is squarely presented, we expressly reject it."

Reversed.

MR. JUSTICE DOUGLAS and MR. JUSTICE REHNQUIST dissent for the reasons stated in the dissenting opinion of MR. JUSTICE DOUGLAS in *United States* v. *State Tax Comm'n of Mississippi*, 412 U. S. 363, 381–390 (1973).

CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–1256. Argued November 19, 1974—Decided June 2, 1975

Respondent union, representing the plumbing and mechanical trades in Dallas, was a party to a multiemployer collective-bargaining agreement with a mechanical contractors association. The agreement contained a "most favored nation" clause, by which the union agreed that if it granted a more favorable contract to any other employer it would extend the same terms to all association members. Respondent picketed petitioner, a general building contractor which subcontracted all plumbing and mechanical work and had no employees respondent wished to represent, to secure a contract whereby petitioner agreed to subcontract such work only to firms that had a current contract with respondent. Petitioner signed under protest and, claiming that the agreement violated §§ 1 and 2 of the Sherman Act and state antitrust laws, brought suit against respondent seeking declaratory and injunctive relief. By the time this case went to trial, respondent had secured identical agreements from other general contractors and was selectively picketing those who resisted. The District Court held (1) that the subcontracting agreement was exempt from federal antitrust laws because it was authorized by the first proviso in § 8 (e) of the National Labor Relations Act (NLRA), which exempts jobsite contracting agreements in the construction industry from the statutory ban on secondary agreements requiring employers to cease doing business with other persons, and (2) that federal labor legislation pre-empted the State's antitrust laws. The Court of Appeals affirmed. *Held:*

1. Respondent union's agreement with petitioner is not entitled to the nonstatutory exemption from the federal antitrust laws

recognized in *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, because it imposed direct restraints on competition among subcontractors that would not have resulted from the elimination of competition based on differences in wages and working conditions. Pp. 621–626.

(a) The agreement indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were derived from efficient operating methods rather than substandard wages and working conditions. P. 623.

(b) The "most-favored nation" clause in the multiemployer bargaining agreement, by insuring that no union subcontractor would have a competitive advantage on any matters covered by the agreement, gave respondent's agreements with petitioner and other general contractors the effect of creating a sheltered market for union subcontractors in that portion of the subcontracting market controlled by signatory general contractors. Pp. 623–624.

(c) Since the agreement did not simply prohibit subcontracting to any nonunion firm but to any firm that did not have a contract with respondent, it gave the union complete control over subcontract work offered by general contractors that had signed the agreement and empowered the union to exclude certain subcontractors from that portion of the market by refusing to deal with them. Pp. 624–625.

2. The first proviso to § 8 (e) of the NLRA does not shelter the challenged agreement from the federal antitrust laws, since that proviso was not intended to authorize subcontracting agreements that are neither within the context of a collective-bargaining relationship nor limited to any particular jobsite. Here respondent, which has never sought to represent petitioner's employees or bargain with petitioner on their behalf, makes no claim to be protecting those employees from working with nonunion men; the agreement was not limited to any particular jobsite; and respondent concededly sought the agreement solely as a means of pressuring Dallas mechanical subcontractors to recognize it as their employees' representative. Pp. 626–633.

3. There is no indication that Congress in the Taft-Hartley amendments or later meant to make NLRA remedies for "hot cargo" agreements exclusive, thus precluding liability for such agreements under the antitrust acts. Pp. 633–634.

4. The agreement is not subject to the state antitrust laws, the use of which to regulate union activities in aid of union organiza-

tion would risk substantial conflict with policies central to federal labor law. Pp. 635–637.

5. Whether the subcontracting agreement violated the Sherman Act, an issue not fully briefed or argued in this Court, must be decided on remand. P. 637.

483 F. 2d 1154, reversed in part, affirmed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 638. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 638.

Joseph F. Canterbury, Jr., argued the cause and filed briefs for petitioner.

David R. Richards argued the cause and filed a brief for respondent.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The building trades union in this case supported its efforts to organize mechanical subcontractors by picketing certain general contractors, including petitioner. The union's sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were

*Briefs of *amici curiae* urging reversal were filed by *Gerard C. Smetana, Lawrence D. Ehrlich, Jerry Kronenberg,* and *Milton Smith* for the Chamber of Commerce of the United States; by *Vincent J. Apruzzese, Francis A. Mastro,* and *William L. Keller* for the Associated General Contractors of America et al.; and by *Kenneth C. McGuiness* and *Robert E. Williams* for the Air-Conditioning and Refrigeration Institute et al.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin, Norton J. Come,* and *Linda Sher* for the National Labor Relations Board, and by *J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

parties to the union's current collective-bargaining agreement. The union disclaimed any interest in representing the general contractors' employees. In this case the picketing succeeded, and petitioner seeks to annul the resulting agreement as an illegal restraint on competition under federal and state law. The union claims immunity from federal antitrust statutes and argues that federal labor regulation pre-empts state law.

I

Local 100 is the bargaining representative for workers in the plumbing and mechanical trades in Dallas. When this litigation began, it was party to a multiemployer bargaining agreement with the Mechanical Contractors Association of Dallas, a group of about 75 mechanical contractors. That contract contained a "most favored nation" clause, by which the union agreed that if it granted a more favorable contract to any other employer it would extend the same terms to all members of the Association.

Connell Construction Co. is a general building contractor in Dallas. It obtains jobs by competitive bidding and subcontracts all plumbing and mechanical work. Connell has followed a policy of awarding these subcontracts on the basis of competitive bids, and it has done business with both union and nonunion subcontractors. Connell's employees are represented by various building trade unions. Local 100 has never sought to represent them or to bargain with Connell on their behalf.

In November 1970, Local 100 asked Connell to agree that it would subcontract mechanical work only to firms that had a current contract with the union. It demanded that Connell sign the following agreement:

> "WHEREAS, the contractor and the union are engaged in the construction industry, and

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"WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8 (e) of the Labor-Management Relations Act;

"WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

"WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

"THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that [if] the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry."

When Connell refused to sign this agreement, Local 100 stationed a single picket at one of Connell's major construction sites. About 150 workers walked off the job, and construction halted. Connell filed suit in state court to enjoin the picketing as a violation of Texas antitrust laws. Local 100 removed the case to federal court. Connell then signed the subcontracting agreement under protest. It amended its complaint to claim that the

agreement violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, and was therefore invalid. Connell sought a declaration to this effect and an injunction against any further efforts to force it to sign such an agreement.

By the time the case went to trial, Local 100 had submitted identical agreements to a number of other general contractors in Dallas. Five others had signed, and the union was waging a selective picketing campaign against those who resisted.

The District Court held that the subcontracting agreement was exempt from federal antitrust laws because it was authorized by the construction industry proviso to § 8 (e) of the National Labor Relations Act, 49 Stat. 452, as added, 73 Stat. 543, 29 U. S. C. § 158 (e). The court also held that federal labor legislation pre-empted the State's antitrust laws. 78 L. R. R. M. 3012 (ND Tex. 1971). The Court of Appeals for the Fifth Circuit affirmed, 483 F. 2d 1154 (1973), with one judge dissenting. It held that Local 100's goal of organizing nonunion subcontractors was a legitimate union interest and that its efforts toward that goal were therefore exempt from federal antitrust laws. On the second issue, it held that state law was pre-empted under *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959). We granted certiorari on Connell's petition. 416 U. S. 981 (1974). We reverse on the question of federal antitrust immunity and affirm the ruling on state law pre-emption.

II

The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. § 17 and 29 U. S. C. § 52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. §§ 104, 105, and 113. These statutes declare

that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U. S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers* v. *Pennington*, 381 U. S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See *Mine Workers* v. *Pennington*, *supra*, at 666; *Jewel Tea*, *supra*, at 692–693 (opinion of WHITE, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e. g.*, *Federation of Musicians* v. *Carroll*, 391 U. S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor

party agree to restrain competition in a business market. See *Allen Bradley Co.* v. *Electrical Workers,* 325 U. S. 797, 806–811 (1945); Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965).

In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.

The multiemployer bargaining agreement between Local 100 and the Association, though not challenged in this suit, is relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market. The "most favored nation" clause in the multiemployer agreement promised to eliminate competition between members of the Association and any other subcontractors that Local 100 might organize. By giving members of the Association a contractual right to insist on terms as favorable as those given any competitor, it guaranteed that the union would make no agreement that would give an unaffiliated contractor a competitive advantage over members of the Association.[1] Subcontractors in the Association thus

[1] The primary effect of the agreement seems to have been to inhibit the union from offering any other employer a more favorable contract. When asked at trial whether another subcontractor could

stood to benefit from any extension of Local 100's organization, but the method Local 100 chose also had the effect of sheltering them from outside competition in that portion of the market covered by subcontracting agreements between general contractors and Local 100. In that portion of the market, the restriction on subcontracting would eliminate competition on all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours, and working conditions.

Success in exacting agreements from general contractors would also give Local 100 power to control access to the market for mechanical subcontracting work. The agreements with general contractors did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work,

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get an agreement on any different terms, Local 100's business agent answered:

"No. The agreement says that no one will be given a more favorable agreement. I couldn't, if I desired, as an agent, sign an agreement other than the ones in existence between the local contractors and the Local 100.

. . . . .

"Q. I see. So that's—in other words, once you sign that contract with the Mechanical Contractors' Association, that sets the only type of agreement which your Union can enter into with any other mechanical contractors; is that correct, sir?

"A. That is true." Tr. 45–46.

it could refuse to sign collective-bargaining agreements with marginal firms. Cf. *Mine Workers* v. *Pennington, supra.* Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude "traveling" subcontractors by refusing to deal with them. Local 100 thus might be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley, supra.*

This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible.[2] This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude

[2] There was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multiemployer bargaining unit, and the only evidence of agreement among those subcontractors was the "most favored nation" clause in the collective-bargaining agreement. In fact, Connell has not argued the case on a theory of conspiracy between the union and unionized subcontractors. It has simply relied on the multiemployer agreement as a factor enhancing the restraint of trade implicit in the subcontracting agreement it signed.

might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement. Cf. *Mine Workers* v. *Pennington*, 381 U. S., at 664–665; *Jewel Tea*, 381 U. S., at 689–690 (opinion of WHITE, J.); *id.*, at 709–713, 732–733 (opinion of Goldberg, J.). In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

III

Local 100 nonetheless contends that the kind of agreement it obtained from Connell is explicitly allowed by the construction-industry proviso to § 8 (e) and that antitrust policy therefore must defer to the NLRA. The majority in the Court of Appeals declined to decide this issue, holding that it was subject to the "exclusive jurisdiction" of the NLRB. 483 F. 2d, at 1174. This Court has held, however, that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.[3] We conclude that § 8 (e) does not allow this type of agreement.

Local 100's argument is straightforward: the first proviso to § 8 (e) allows "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other

[3] *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 684–688 (1965) (opinion of WHITE, J.); *id.*, at 710 n. 18 (opinion of Goldberg, J.); cf. *Vaca* v. *Sipes*, 386 U. S. 171, 176–188 (1967); *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962).

work." [4] Local 100 is a labor organization, Connell is an employer in the construction industry, and the agreement covers only work "to be done at the site of construction, alteration, painting or repair of any building, structure, or other works." Therefore, Local 100 says, the agreement comes within the proviso. Connell responds by arguing that despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that is, Congress did not intend to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion

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[4] Section 8 (e) provides:

"It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)[(4)(B)] of this section the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception." 29 U. S. C. § 158 (e).

subcontractors. On its face, the proviso suggests no such limitation. This Court has held, however, that § 8 (e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment:

> "It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459." *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 619 (1967).

Section 8 (e) was part of a legislative program designed to plug technical loopholes in § 8 (b) (4)'s general prohibition of secondary activities. In § 8 (e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by § 8 (b) (4). See *National Woodwork Mfrs. Assn., supra*, at 634. The provisos exempting the construction and garment industries were added by the Conference Committee in an apparent compromise between the House bill, which prohibited all "hot cargo" agreements, and the Senate bill, which prohibited them only in the trucking industry.[5] Although the garment-industry proviso was supported by detailed explanations in both Houses,[6] the construction-industry proviso was explained only by bare references to "the pattern of collec-

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[5] See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39–40 (1959).

[6] 105 Cong. Rec. 17327 (1959) (remarks by Sen. Kennedy); *id.*, at 17381 (remarks by Sens. Javits and Goldwater); *id.*, at 15539 (memorandum by Reps. Thompson and Udall); *id.*, at 16590 (memorandum by Sen. Kennedy and Rep. Thompson). These debates are reproduced in 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1377, 1385, 1576, 1708 (1959) (hereinafter Leg. Hist. of LMRDA).

tive bargaining" in the industry.[7] It seems, however, to have been adopted as a partial substitute for an attempt to overrule this Court's decision in *NLRB* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951).[8] Discussion of "special problems" in the construction industry, applicable to both the § 8 (e) proviso and the attempt to overrule *Denver Building Trades*, focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcon-

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[7] 105 Cong. Rec. 17899 (1959) (remarks by Sen. Kennedy); *id.*, at 18134 (remarks by Rep. Thompson); 2 Leg. Hist. of LMRDA 1432, 1721.

[8] President Eisenhower's message to Congress recommending labor reform legislation urged amendment of the secondary-boycott provisions to permit secondary activity "under certain circumstances, against secondary employers engaged in work at a *common construction site* with the primary employer." S. Doc. No. 10, 86th Cong., 1st Sess., 3 (1959) (emphasis added). Various bills introduced in both Houses included such provisions, see 2 Leg. Hist. of LMRDA 1912–1915, but neither the bill that passed the Senate nor the one that passed the House contained a *Denver Building Trades* provision. The Conference Committee proposed to include such an amendment to § 8 (b) (4) (B) in the Conference agreement, along with a closely linked construction-industry exemption from § 8 (e). 105 Cong. Rec. 17333 (1959) (proposed Senate resolution), 2 Leg. Hist. of LMRDA 1383. But a parliamentary obstacle killed the § 8 (b) (4) (B) amendment, and only the § 8 (e) proviso survived. See 105 Cong. Rec. 17728–17729, 17901–17903, 2 Leg. Hist. of LMRDA 1397–1398, 1434–1436. References to the proviso suggest that the Committee may have intended the § 8 (e) proviso simply to preserve the status quo under *Carpenters* v. *NLRB* (*Sand Door*), 357 U. S. 93 (1958), pending action on the *Denver Building Trades* problem in the following session. See H. R. Rep. No. 1147, *supra*, n. 5, at 39–40; 105 Cong. Rec. 17900 (1959) (report of Sen. Kennedy on Conference agreement), 2 Leg. Hist. of LMRDA 1433. Although Senator Kennedy introduced a bill to amend § 8 (b) (4), S. 2643, 86th Cong., 1st Sess. (1959), it was never reported out of committee.

tractors at the jobsite.[9] Congress limited the construction-industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment-industry proviso, Congress did not afford construction unions an exemption from § 8 (b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon. In keeping with these limitations, the Court has interpreted the construction-industry proviso as

> "a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." *National Woodwork Mfrs. Assn.*, 386 U. S., at 638–639 (footnote omitted).

Other courts have suggested that it serves an even narrower function:

> "[T]he purpose of the section 8 (e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Drivers Local 695* v. *NLRB*, 124 U. S. App. D. C. 93, 99, 361 F. 2d 547, 553 (1966).

See also *Denver Building Trades*, 341 U. S., at 692–693 (DOUGLAS, J., dissenting); *Essex County & Vicinity*

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[9] See 105 Cong. Rec. 17881 (1959) (remarks by Sen. Morse); *id.*, at 15541 (memorandum by Reps. Thompson and Udall); *id.*, at 15551–15552 (memorandum by Sen. Elliott); *id.*, at 15852 (remarks by Rep. Goodell); see also *id.*, at 20004–20005 (post-legislative remarks by Rep. Kearns); 2 Leg. Hist. of LMRDA 1425, 1577, 1588, 1684, and 1861.

District Council of Carpenters v. *NLRB*, 332 F. 2d 636, 640 (CA3 1964).

Local 100 does not suggest that its subcontracting agreement is related to any of these policies. It does not claim to be protecting Connell's employees from having to work alongside nonunion men. The agreement apparently was not designed to protect Local 100's members in that regard, since it was not limited to jobsites on which they were working. Moreover, the subcontracting restriction applied only to the work Local 100's members would perform themselves and allowed free subcontracting of all other work, thus leaving open a possibility that they would be employed alongside nonunion subcontractors. Nor was Local 100 trying to organize a nonunion subcontractor on the building project it picketed. The union admits that it sought the agreement solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees.

If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon.[10] The unions

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[10] Local 100 contends, unsoundly we think, that the NLRB has decided this issue in its favor. It cites *Los Angeles Building & Construction Trades Council (B & J Investment Co.)*, 214 N. L. R. B. No. 86, 87 L. R. R. M. 1424 (1974), and a memorandum from the General Counsel explaining his decision not to file unfair labor practice charges in a similar case, *Plumbers Local 100 (Hagler Construction Co.)*, No. 16–CC–447 (May 1, 1974). In *B & J Investment* the Board approved, without comment, an administrative law judge's conclusion that the § 8 (e) proviso authorized a subcontracting agreement between the Council and a general contractor who used none of his own employees in the particular construction project. The agreement in question may have been a prehire con-

would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the agreement recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.

It is highly improbable that Congress intended such a result. One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees.[11] Congress accomplished this goal by enacting § 8 (b)(7), which restricts primary recognitional picketing, and by further tightening § 8 (b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns. Construction unions are fully covered by these sections. The only special consideration given them in organizational campaigns is § 8 (f), which allows "prehire" agreements in the construction industry, but only under careful safeguards preserving workers' rights to decline union representation. The legislative history accompanying § 8 (f) also suggests that Congress may not

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tract under § 8 (f), and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship. The General Counsel's memorandum in *Hagler Construction* is plainly addressed to a different argument—that a subcontracting clause should be allowed only if there is a *pre-existing* collective-bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement.

[11] 105 Cong. Rec. 6428–6429 (1959) (remarks of Sen. Goldwater); *id.*, at 6648–6649 (remarks of Sen. McClellan); *id.*, at 6664–6665 (remarks of Sen. Goldwater); *id.*, at 14348 (memorandum of Rep. Griffin); 2 Leg. Hist. of LMRDA 1079, 1175–1176, 1191–1192, 1523.

have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers.[12]

These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8 (e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction-industry proviso as broadly as Local 100 suggests.[13] Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.[14]

Finally, Local 100 contends that even if the subcontracting agreement is not sanctioned by the construction-

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[12] H. R. Rep. No. 1147, *supra*, n. 5, at 42; 105 Cong. Rec. 10104 (1959) (memorandum of Sen. Goldwater); *id.*, at 18128 (remarks by Rep. Barden); 2 Leg. Hist. of LMRDA 1289, 1715. The NLRB has taken this view. *Operating Engineers Local 542*, 142 N. L. R. B. 1132 (1963), enforced, 331 F. 2d 99 (CA3), cert. denied, 379 U. S. 889 (1964).

[13] As noted above, *supra*, at 628–630, the garment-industry proviso reflects different considerations. The text of the proviso and the treatment in congressional debates and reports suggest that Congress intended to authorize garment workers' unions to continue using subcontracting agreements as an organizational weapon. See *Danielson* v. *Joint Board*, 494 F. 2d 1230 (CA2 1974) (Friendly, J.).

[14] Connell also has argued that the subcontracting agreement was subject to antitrust sanctions because the construction-industry proviso authorizes only voluntary agreements. The foundation of this argument is a contention that § 8 (b) (4) (B) forbids picketing to secure an otherwise lawful "hot cargo" agreement in the construction industry. Because we hold that the agreement in this case is outside the § 8 (e) proviso, it is unnecessary to consider this alternative contention.

industry proviso and therefore is illegal under § 8 (e), it cannot be the basis for antitrust liability because the remedies in the NLRA are exclusive. This argument is grounded in the legislative history of the 1947 Taft-Hartley amendments. Congress rejected attempts to regulate secondary activities by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts, and created special remedies under the labor law instead.[15] It made secondary activities unfair labor practices under § 8 (b)(4), and drafted special provisions for preliminary injunctions at the suit of the NLRB and for recovery of actual damages in the district courts. § 10 (*l*) of the NLRA, 49 Stat. 453, as added, 61 Stat. 149, as amended, 29 U. S. C. § 160 (*l*), and § 303 of the Labor Management Relations Act, 61 Stat. 158, as amended, 29 U. S. C. § 187. But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by § 8 (b)(4), it has no relevance to the question whether Congress meant to preclude antitrust suits based on the "hot cargo" agreements that it outlawed in 1959. There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8 (e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.[16]

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[15] See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House Managers' statement), 65–67 (1947); 93 Cong. Rec. 4757, 4770, 4834–4874 (1947) (debates over Sen. Ball's proposal for antitrust sanctions and Sen. Taft's compromise proposal for actual damages, which became § 303 of the NLRA).

[16] The dissenting opinion of MR. JUSTICE STEWART argues that § 303 provides the exclusive remedy for violations of § 8 (e), thereby precluding recourse to antitrust remedies. For that proposition the dissenting opinion relies upon "considerable evidence in the legislative materials." *Post*, at 650. In our view, these materials are

We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

IV

Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state antitrust law may apply as well. The Court has held repeatedly that federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. *E. g., Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 (1971); *Teamsters* v. *Morton,* 377 U. S. 252 (1964); *Teamsters* v. *Oliver,* 358 U. S. 283 (1959).[17] The use of state antitrust law to

unpersuasive. In the first place, Congress did not amend § 303 expressly to provide a remedy for violations of § 8 (e). See Labor-Management Reporting and Disclosure Act of 1959, §§ 704 (d), (e), 73 Stat. 544–545. The House in 1959 did reject proposals by Representatives Hiestand, Alger, and Hoffman to repeal labor's antitrust immunity. *Post,* at 650–654. Those proposals, however, were much broader than the issue in this case. The Hiestand-Alger proposal would have repealed antitrust immunity for any action in concert by two or more labor organizations. The Hoffman proposal apparently intended to repeal labor's antitrust immunity entirely. That the Congress rejected these extravagant proposals hardly furnishes proof that it intended to extend labor's antitrust immunity to include agreements with nonlabor parties, or that it thought antitrust liability under the existing statutes would be inconsistent with the NLRA. The bill introduced by Senator McClellan two years later provides even less support for that proposition. Like most bills introduced in Congress, it never reached a vote.

[17] In most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced

regulate union activities in aid of organization must also be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.

In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). State antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies.[18] Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

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by the NLRB. See *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971); *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959). But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. Cf. *Vaca* v. *Sipes*, 386 U. S. 171, 176–188 (1967); *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962).

[18] Texas law is a good example. Texas Rev. Civ. Stat. Ann., Arts. 5152 and 5153 (1971), declare that it is lawful for workers to associate in unions and to induce other persons to accept or reject employment. Article 5154, however, referring to the preceding articles, provides: "Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies." The Texas antitrust statutes prohibit, among other specified agreements, trusts, and monopolies, any combination of two or more persons to restrict "the free pursuit of a lawful business." Tex. Bus. & Comm. Code §§ 15.02–15.04 (1968).

Because employee organization is central to federal labor policy and regulation of organizational procedures is comprehensive, federal law does not admit the use of state antitrust law to regulate union activity that is closely related to organizational goals. Of course, other agreements between unions and nonlabor parties may yet be subject to state antitrust laws. See *Teamsters* v. *Oliver, supra,* at 295–297. The governing factor is the risk of conflict with the NLRA or with federal labor policy.

V

Neither the District Court nor the Court of Appeals decided whether the agreement between Local 100 and Connell, if subject to the antitrust laws, would constitute an agreement that restrains trade within the meaning of the Sherman Act. The issue was not briefed and argued fully in this Court. Accordingly, we remand for consideration whether the agreement violated the Sherman Act.[19]

Reversed in part, affirmed in part, and remanded.

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[19] In addition to seeking a declaratory judgment that the agreement with Local 100 violated the antitrust laws, Connell sought a permanent injunction against further picketing to coerce execution of the contract in litigation. Connell obtained a temporary restraining order against the picketing on January 21, 1971, and thereafter executed the contract—under protest—with Local 100 on March 28, 1971. So far as the record in this case reveals, there has been no further picketing at Connell's construction sites. Accordingly, there is no occasion for us to consider whether the Norris-LaGuardia Act forbids such an injunction where the specific agreement sought by the union is illegal, or to determine whether, within the meaning of the Norris-LaGuardia Act, there was a "labor dispute" between these parties. If the Norris-LaGuardia Act were applicable to this picketing, injunctive relief would not be available under the antitrust laws. See *United States* v. *Hutcheson,* 312 U. S. 219 (1941). If the agreement in question is held on remand to be

MR. JUSTICE DOUGLAS, dissenting.

While I join the opinion of MR. JUSTICE STEWART, I write to emphasize what is, for me, the determinative feature of the case. Throughout this litigation, Connell has maintained only that Local 100 coerced it into signing the subcontracting agreement. With the complaint so drawn, I have no difficulty in concluding that the union's conduct is regulated solely by the labor laws. The question of antitrust immunity would be far different, however, if it were alleged that Local 100 had conspired with mechanical subcontractors to force nonunion subcontractors from the market by entering into exclusionary agreements with general contractors like Connell. An arrangement of that character was condemned in *Allen Bradley Co.* v. *Electrical Workers,* 325 U. S. 797 (1945), which held that Congress did not intend "to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act," *id.,* at 810. Were such a conspiracy alleged, the multiemployer bargaining agreement between Local 100 and the mechanical subcontractors would unquestionably be relevant. See *Mine Workers* v. *Pennington,* 381 U. S. 657, 673 (1965) (concurring opinion); *Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676, 737 (1965) (dissenting opinion). But since Connell has never alleged or attempted to show any conspiracy between Local 100 and the subcontractors, I agree that Connell's remedies, if any, are provided exclusively by the labor laws.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

As part of its effort to organize mechanical contractors in the Dallas area, the respondent Local Union No. 100

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invalid under federal antitrust laws, we cannot anticipate that Local 100 will resume picketing to obtain or enforce an illegal agreement.

engaged in peaceful picketing to induce the petitioner Connell Construction Co., a general contractor in the building and construction industry, to agree to subcontract plumbing and mechanical work at the construction site only to firms that had signed a collective-bargaining agreement with Local 100. None of Connell's own employees were members of Local 100, and the subcontracting agreement contained the union's express disavowal of any intent to organize or represent them. The picketing at Connell's construction site was therefore secondary activity, subject to detailed and comprehensive regulation pursuant to § 8 (b)(4) of the National Labor Relations Act, as added, 61 Stat. 141, 29 U. S. C. § 158 (b)(4), and § 303 of the Labor Management Relations Act, 61 Stat. 158, as amended, 29 U. S. C. § 187. Similarly, the subcontracting agreement under which Connell agreed to cease doing business with nonunion mechanical contractors is governed by the provisions of § 8 (e) of the National Labor Relations Act, 29 U. S. C. § 158 (e). The relevant legislative history unmistakably demonstrates that in regulating secondary activity and "hot cargo" agreements in 1947 and 1959, Congress selected with great care the sanctions to be imposed if proscribed union activity should occur. In so doing, Congress rejected efforts to give private parties injured by union activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws. Accordingly, I would affirm the judgment before us.

I

For a period of 15 years, from passage of the Norris-LaGuardia Act, 47 Stat. 70, in 1932 [1] until enactment of

[1] Before 1932 this Court had held that secondary strikes and boycotts were not exempt from the coverage of the antitrust laws. *E. g., Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford*

the Labor Management Relations Act (the Taft-Hartley Act), 61 Stat. 136, in 1947, union economic pressure directed against a neutral, secondary employer was not subject to sanctions under either federal labor law or antitrust law, at least in the absence of proof that the union was coercing the secondary employer in furtherance of a conspiracy with a nonlabor group. See *United States* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797. "Congress abolished, for purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee . . . .'" *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U. S. 612, 623.

In *Hunt* v. *Crumboch*, 325 U. S. 821, for example, the Court found that union conduct in forcing a freight carrier out of business was protected activity beyond the reach of the federal antitrust laws even though it involved secondary pressure that culminated in the union's compelling the carrier's principal patron to break its contract with the carrier and to discharge the carrier from further service. "That which Congress has recognized as lawful," the Court noted, "this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." *Id.*, at 825 n. 1.

Congressional concern over labor abuses of the broad immunity granted by the Norris-LaGuardia Act was one of the considerations that resulted in passage of the Taft-

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Cut Stone Co. v. *Journeymen Stone Cutters' Assn.*, 274 U. S. 37. *Duplex* and its progeny were overruled by Congress with passage of the Norris-LaGuardia Act, 47 Stat. 70. See *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 100–103; *United States* v. *Hutcheson*, 312 U. S. 219, 229–231, 235–237.

Hartley Act in 1947, which, among other things, prohibited specified union secondary activity. See *National Woodwork Mfrs. Assn.* v. *NLRB, supra,* at 623. The central thrust of that statutory provision was to forbid "a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another person to cease doing business with some third party." *Carpenters' Union* v. *NLRB,* 357 U. S. 93, 98.[2] In condemning "specific union conduct directed to specific objectives," *ibid.,* however, Congress deliberately chose not to subject unions engaging in prohibited secondary activity to the sanctions of the antitrust laws.

Section 12 (a)(3) of the Hartley bill, H. R. 3020, 80th Cong., 1st Sess., as initially passed by the House, defined "unlawful concerted activities" to include an "illegal boycott." 1 NLRB Legislative History of the Labor Management Relations Act, 1947, p. 205 (hereinafter Leg. Hist. of LMRA). Section 12 (c) provided that the Norris-LaGuardia Act should have no "application in any action or proceeding in a court of the United States involving any activity defined in this section as unlaw-

[2] The Act added § 8 (b)(4) to the National Labor Relations Act, making it an unfair labor practice for a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ." 61 Stat. 141.

ful." 1 Leg. Hist. of LMRA 206–207. The Committee on Education and Labor explained in its report on the Hartley bill:

> "Illegal boycotts take many forms. . . . Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time .... Under [§ 12], these practices are called by their correct name, 'unlawful concerted activities.' It is provided that any person injured in his person, property, or business by an unlawful concerted activity affecting commerce may sue the person or persons responsible for the injury in any district court having jurisdiction of the parties and recover damages. The bill makes inapplicable in such suits the Norris-LaGuardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness, no matter how violent their disputes became. Persons who engage in unlawful concerted activities are subject to losing their rights and privileges under the act." H. R. Rep. No. 245, 80th Cong., 1st Sess., 24, 44, 1 Leg. Hist. of LMRA 315, 335.

The Senate, however, refused to adopt the House's removal of antitrust immunity for prohibited secondary activity, choosing instead to make the remedies available under federal labor law exclusive. The Senate Committee on Labor and Public Welfare approved S. 1126, 80th Cong., 1st Sess., which provided that proscribed secondary conduct would be an unfair labor practice and could be enjoined on application of the National Labor Relations Board. No private remedy for an injured employer was authorized in the bill approved by the Committee. See S. Rep. No. 105, 80th Cong., 1st Sess., 7–8, 22, 1 Leg. Hist. of LMRA 413–414, 428.

Four members of the Senate Committee, although

supporting the provisions of S. 1126 as reported by the Committee, felt that a number of the provisions of the bill could be stronger. S. Rep. No. 105, *supra,* at 50, 1 Leg. Hist. of LMRA 456. In particular, the minority Senators proposed:

> "An amendment reinserting in the bill a section making secondary boycotts and jurisdictional strikes unlawful and providing for direct suits in the courts by any injured party. . . .
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> "The amendment proposes that [the injured party] be entitled to file a suit for damages and obtain a temporary injunction while that suit is being heard. . . .
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> "The amendment, furthermore, removes the protection of the Clayton Act from monopoly agreements to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions on the purchase, sale, or use of material, machines, or equipment. While the existence of the union should not be a combination in restraint of trade, we see no reason why unions should not be subject in this field to the same restriction as are competing employers." S. Rep. No. 105, *supra,* at 54–55, 1 Leg. Hist. of LMRA 460–461.

Senator Ball, one of the four minority Senators on the Labor and Public Welfare Committee, did in fact offer an amendment on the Senate floor that was "designed to correct the interpretation of the Norris-LaGuardia and Clayton acts made by the Supreme Court in the Hutchinson [*sic*] case, and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on

the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers." 93 Cong. Rec. 4838, 2 Leg. Hist. of LMRA 1354.[3]

Although stating that he personally agreed with the changes proposed by Senator Ball, Senator Taft argued for defeat of the Ball amendment, explaining that resistance to providing a private injunctive remedy in cases of secondary boycotts was so strong that an attempt to eliminate the labor exemption from the antitrust laws would lead to the defeat of any effort to provide for a private damages remedy for injured parties. Senator Taft proposed as a substitute that private parties be given only the right to sue for actual damages. 93 Cong. Rec. 4843–4844, 2 Leg. Hist. of LMRA 1365. The Ball amendment was thereafter defeated, 93 Cong. Rec. 4847, 2 Leg. Hist. of LMRA 1369–1370, and Senator Taft introduced his proposal "to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong. Rec. 4858, 2 Leg. Hist. of LMRA 1370–1371.

In response to Senator Morse's claim that the proposal would impose virtually unlimited liability on unions, Senator Taft made plain that he was not advocating the use of antitrust sanctions against prohibited secondary activity. "Under the Sherman Act the same question of boycott damage is subject to a suit for [treble] dam-

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[3] The amendment introduced by Senator Ball provided in part that the Clayton Act and the Norris-LaGuardia Act "shall not be applicable in respect of violations of subsection (a) [defining prohibited secondary conduct], or in respect of any contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale or use of any material, machines, or equipment." 93 Cong. Rec. 4757 (1947).

ages and attorneys' fees. In this case we simply provide for the amount of the actual damages." 93 Cong. Rec. 4872–4873, 2 Leg. Hist. of LMRA 1398; see *Teamsters* v. *Morton*, 377 U. S. 252, 260 n. 16. Senator Taft's proposal for a private damages remedy under federal labor law was adopted by the Senate. 93 Cong. Rec. 4874–4875, 2 Leg. Hist. of LMRA 1399–1400.

In Conference, the House members agreed to eliminate the provisions of the Hartley bill which, like the Ball amendment, provided that the Norris-LaGuardia Act should have no application to private suits for unlawful secondary activity. See H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House Managers' statement), 58–59, 1 Leg. Hist. of LMRA 562–563. With only "clarifying changes," H. R. Conf. Rep. No. 510, *supra*, at 67, 1 Leg. Hist. of LMRA 571, the House-Senate Conferees and then both Houses of Congress agreed to regulate union secondary activity by making specified activity an unfair labor practice under § 8 (b)(4) of the National Labor Relations Act, authorizing the Board to seek injunctions against such activity, 29 U. S. C. § 160 (*l*), and providing for recovery of actual damages in a suit by a private party under Senator Taft's compromise proposal, which became § 303 of the Labor Management Relations Act, 29 U. S. C. § 187.[4] Congress in 1947 did not prohibit all

[4] Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158–159, provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise

secondary activity by labor unions, see *Carpenters* v. *NLRB*, 357 U. S. 93; and those practices which it did outlaw were to be remedied only by seeking relief from the Board or by pursuing the newly created, exclusive federal damages remedy provided by § 303. *Teamsters* v. *Morton*, *supra*.

II

Contrary to the assertion in the Court's opinion, *ante*, at 634, the deliberate congressional decision to make § 303 the exclusive private remedy for unlawful secondary activity is clearly relevant to the question of Local 100's antitrust liability in the case before us. The Court is correct, of course, in noting that § 8 (e)'s prohibition of "hot cargo" agreements was not added to the Act until 1959, and that § 303 was not then amended to cover § 8 (e) violations standing alone. But as part of the 1959 amendments designed to close "technical loopholes" perceived in the Taft-Hartley Act, Congress amended § 8 (b)(4) to make it an unfair labor practice for a labor organization to threaten or coerce a neutral employer, either directly or through his employees, where an object of the secondary pressure is to force the employer to enter into an agreement prohibited by § 8 (e).[5] At the same

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dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

. . . . . .

"(b) Whoever shall be injured in his business or property by reason o[f] any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

[5] Section 8 (b)(4) of the National Labor Relations Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959,

time, Congress expanded the scope of the § 303 damages remedy to allow recovery of the actual damages sustained as a result of a union's engaging in secondary activity to force an employer to sign an agreement in violation of § 8 (e).[6] In short, Congress has provided an employer like Connell with a fully effective private damages remedy for the allegedly unlawful union conduct involved in this case.

The essence of Connell's complaint is that it was coerced by Local 100's picketing into "conspiring" with the union by signing an agreement that limited its ability

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73 Stat. 519, 542–543, now provides in part that it shall be an unfair labor practice for a labor organization or its agents:

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section . . . ." 29 U. S. C. § 158 (b) (4).

[6] Section 303, as amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 545, now provides:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158 (b) (4) of this title.

"(b) Whoever shall be injured in his business or property by reason o[f] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." 29 U. S. C. § 187.

to subcontract mechanical work on a competitive basis.[7] If, as the Court today holds, the subcontracting agreement is not within the construction-industry proviso to § 8 (e), then Local 100's picketing to induce Connell to sign the agreement constituted a § 8 (b)(4) unfair labor practice, and was therefore also unlawful under § 303 (a), 29 U. S. C. § 187 (a).[8] Accordingly, Connell has the right to sue Local 100 for damages sustained as a result

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[7] Indeed, Connell's original state-court complaint was filed before Connell had signed any agreement with Local 100. See *ante*, at 620. At that point it was apparent that the primary reason for the lawsuit was Connell's request for an injunction to stop the union's picketing.

[8] If, contrary to the Court's conclusion, see *ante*, at 626–633, Congress intended what it said in the proviso to § 8 (e), then the subcontracting agreement is valid and, under the view of the Board and those Courts of Appeals that have considered the question, Local 100's picketing to obtain the agreement would also be lawful. See, *e. g.*, *Orange Belt District Council of Painters* v. *NLRB*, 117 U. S. App. D. C. 233, 236, 328 F. 2d 534, 537; *Construction Laborers* v. *NLRB*, 323 F. 2d 422 (CA9); *Northeastern Indiana Bldg. Trades Council*, 148 N. L. R. B. 854, enforcement denied on other grounds, 122 U. S. App. D. C. 220, 352 F. 2d 696. Connell would therefore have neither a remedy under § 303 nor one with the Board.

It would seem necessarily to follow that conduct specifically authorized by Congress in the National Labor Relations Act could not by itself be the basis for federal antitrust liability, unless the Court intends to return to the era when the judiciary frustrated congressional design by determining for itself "what public policy in regard to the industrial struggle demands." *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 485 (Brandeis, J., dissenting). See *United States* v. *Hutcheson*, 312 U. S. 219. In my view, however, even if Local 100's conduct was unlawful, Connell may not seek to invoke the sanctions of the antitrust laws. Accordingly, I find it unnecessary to decide in this case whether the subcontracting agreement entered into by Connell and Local 100 is within the ambit of the construction-industry proviso to § 8 (e), and if it is, whether it was permissible for Local 100 to utilize peaceful picketing to induce Connell to sign the agreement.

of Local 100's unlawful secondary activity pursuant to § 303 (b), 29 U. S. C. § 187 (b). Although "limited to actual, compensatory damages," *Teamsters* v. *Morton*, 377 U. S., at 260, Connell would be entitled under § 303 to recover all damages to its business that resulted from the union's coercive conduct, including any provable damage caused by Connell's inability to subcontract mechanical work to nonunion firms. Similarly, any nonunion mechanical contractor who believes his business has been harmed by Local 100's having coerced Connell into signing the subcontracting agreement is entitled to sue the union for compensatory damages; for § 303 broadly grants its damages action to "[w]hoever shall be injured in his business or property" by reason of a labor organization's engaging in a § 8 (b)(4) unfair labor practice.[9]

[9] If Connell and Local 100 had entered into a purely voluntary "hot cargo" agreement in violation of § 8 (e), an injured nonunion mechanical subcontractor would have no § 303 remedy because the union would not have engaged in any § 8 (b) (4) unfair labor practice. The subcontractor, however, would still be able to seek the full range of Board remedies available for a § 8 (e) unfair labor practice. Moreover, if Connell had truly agreed to limit its subcontracting without any coercion whatsoever on the part of Local 100, the affected subcontractor might well have a valid antitrust claim on the ground that Local 100 and Connell were engaged in the type of conspiracy aimed at third parties with which this Court dealt in *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797. At the very least, an antitrust suit by an injured subcontractor under circumstances in which Congress had failed to provide any form of private remedy for damage resulting from an illegal "hot cargo" agreement would present a very different question from the one before us—a question which it is not now necessary to answer. Cf. *Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676, 708 n. 9 (opinion of Goldberg, J.).

On the other hand, the signatory of a purely voluntary agreement that violates § 8 (e) is fully protected from any damage that might result from the illegal "hot cargo" agreement by his ability simply to ignore the contract provision that violates § 8 (e). If the union should attempt to enforce the illicit "hot cargo" clause through any

Moreover, there is considerable evidence in the legislative materials indicating that in expanding the scope of § 303 to include a remedy for secondary pressure designed to force an employer to sign an illegal "hot cargo" clause and in restricting the remedies for violation of § 8 (e) itself to those available from the Board, Congress in 1959 made the same deliberate choice to exclude antitrust remedies as was made by the 1947 Congress.

While the House was considering labor reform legislation in the summer of 1959, specific proposals were made to apply the antitrust laws to labor unions. Representative Hiestand of California introduced a bill which "would solve many of the problems attending unbridled union power as it exists and operates in this country. My proposal is in the nature of antitrust legislation, applied to labor unions." 105 Cong. Rec. 12135, 2 NLRB Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1507 (hereinafter Leg. Hist. of LMRDA). Representative Alger of Texas joined in cosponsoring the legislation, stating that "[u]nion monopoly power" manifests itself in "restrictive trade practices such as price fixing, restrictions on use of new processes and technological improvements, exclusion of products for the market, and so forth . . . . This bill deals directly with [this aspect] of union monopoly power." 105 Cong. Rec. 12136, 2 Leg. Hist. of LMRDA 1507. Representative Alger added the following explanation of the bill:

"Under the language of H. R. 8003 any attempt

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form of coercion, the employer may then bring a § 303 damages suit or may file an unfair labor practice charge with the Board. See 29 U. S. C. § 158 (b) (4) (B). Since § 8 (e) provides that any prohibited agreement is "unenforcible and void," any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.

> by a union to induce an employer or a group of employers to comply with a union demand which would result in restrictive trade practices would be unlawful, and an employer faced with such a demand could seek legal remedies to restrain the union from enforcing its demand. The consequent denial to unions of the right to fix prices or impose other artificial market limitations would not in any way interfere with normal and legitimate union functions or with their proper collective bargaining powers. They would merely be placed on an equal footing with all other groups in society as was the case during the fifty years prior to the Hutcheson decision." 105 Cong. Rec. 12137, 2 Leg. Hist. of LMRDA 1508.

The Landrum-Griffin bill, H. R. 8400, 86th Cong., 1st Sess., which, as amended, was enacted as the Labor-Management Reporting and Disclosure Act of 1959,[10] by contrast, clearly provided that the new secondary-boycott

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[10] The legislative proceedings leading to the passage of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 73 Stat. 519, began in January 1959 when Senator John Kennedy introduced S. 505, 86th Cong., 1st Sess. In March 1959 Senator Kennedy introduced S. 1555, incorporating 46 amendments to S. 505 made by the Committee on Labor and Public Welfare. S. 1555, with various additional amendments, was approved by the Senate on April 25, 1959, and sent to the House, where it was referred to the Committee on Education and Labor. On July 30, 1959, the House Committee favorably reported H. R. 8342, 86th Cong., 1st Sess. One week earlier H. R. 8400 and H. R. 8401, identical bills, were introduced in the House by Representatives Landrum and Griffin, respectively. The House voted on August 13, 1959, to substitute the text of H. R. 8400 for the text of the House Committee bill, and the Landrum-Griffin bill was then inserted by the House in S. 1555 in lieu of its provisions. The Conference made several substantive changes in the Landrum-Griffin bill, which was then passed by both the House and Senate and approved by the President. See generally 1 Leg. Hist. of LMRDA vii-xi.

and "hot cargo" provisions were to be enforced solely through the Board and by use of the § 303 damages remedy. See 105 Cong. Rec. 14347–14348, 2 Leg. Hist. of LMRDA 1522–1523. Recognizing this important difference, Representative Alger proposed to amend the Landrum-Griffin bill by adding, as an additional title, the antitrust provisions of H. R. 8003. 105 Cong. Rec. 15532–15533, 2 Leg. Hist. of LMRDA 1569. Representative Alger once again stated that his proposed amendment would make it unlawful for an individual local union to "[e]nter into any arrangement—voluntary or coerced—with any employer, groups of employers, or other unions which cause product boycotts, price fixing, or other types of restrictive trade practices." 105 Cong. Rec. 15533, 2 Leg. Hist. of LMRDA 1569.

Representative Griffin responded to Representative Alger's proposed amendment by observing:

> "[It] serves to point out that the substitute [the Landrum-Griffin bill] is a minimum bill. It might be well at this point to mention some provisions that are not in it.
>
> "There is no antitrust law provision in this bill.
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> . . . . .
>
> "This is truly a minimum bill that a responsible Congress should pass. I believe I speak for the gentleman from Georgia [MR. LANDRUM], as well as myself when I say that if amendments are offered on the floor to add antitrust provisions or others that have been mentioned, I, for one, will oppose them. The gentleman from Georgia and I have tried to balance delicately the provisions which we believe should be in a bill at this time and which a majority of this body could support." 105 Cong. Rec. 15535, 2 Leg. Hist. of LMRDA 1571–1572.

The Alger amendment was rejected, as were additional

efforts to subject proscribed union activities to the antitrust laws and their sanctions. See, *e. g.*, 105 Cong. Rec. 15853, 2 Leg. Hist. of LMRDA 1685 (amendment offered by Rep. Hoffman). The House then adopted the Landrum-Griffin bill over protests that it "does not go far enough, that it needs more teeth, and that more teeth are going to come in the form of legislation to bring labor union activities under the antitrust laws." 105 Cong. Rec. 15858, 2 Leg. Hist. of LMRDA 1690 (remarks of Rep. Alger); see 105 Cong. Rec. 15859–15860, 2 Leg. Hist. of LMRDA 1691–1692 (adoption of the Landrum amendment to H. R. 8342, substituting in lieu of the text thereof the text of H. R. 8400 as amended).

The House-Senate Conferees made some substantive changes in the language of the amendments to § 8 (b)(4), and also added the construction- and garment-industry provisos to § 8 (e). See generally Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257. But no change was made in the nature of the sanctions authorized for violations of either section by the House-passed Landrum-Griffin bill: An injured party could either seek relief from the Board or bring suit for damages under § 303 against unions that violate the revised secondary-boycott prohibitions. No provisions were made for exposing proscribed union secondary activity or "hot cargo" agreements to antitrust liability. See H. R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 1 Leg. Hist. of LMRDA 934.[11]

[11] Representative Hiestand, during House debate on the report of the Conference Committee, recommended adoption of the bill as amended by the Conference and complimented Representatives Landrum and Griffin for their efforts in guiding the bill through Congress. But in expressing concern over the fact that the legislation did not restore antitrust sanctions for union secondary activity and other anticompetitive restraints of trade, he warned: "[W]e

Indeed, two years after enactment of the Landrum-Griffin Act, Senator McClellan, whose committee hearings into abuses caused by concentrated labor power had played a major role in generating support for the 1959 labor reform legislation, together with five other Senators, introduced a bill to provide antitrust sanctions for illegal "hot cargo" agreements in the transportation industry, despite the fact that such agreements were already expressly prohibited by § 8 (e).[12] As it had in 1947 and 1959, however, Congress in 1961 rejected this effort to subject illegal union secondary conduct to the sanctions of the antitrust laws.

In sum, the legislative history of the 1947 and 1959 amendments and additions to national labor law clearly demonstrates that Congress did not intend to restore antitrust sanctions for secondary boycott activity such as that engaged in by Local 100 in this case, but rather

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should act today with full knowledge that passage of the Landrum-Griffin bill will not solve every problem. The heart of the problem, the very heart, is the sheer power in the hands of labor union leaders due to their above-the-law status with respect to our antimonopoly laws." 105 Cong. Rec. 18132; 2 Leg. Hist. of LMRDA 1719.

[12] Section 2 (b) (2) of Senator McClellan's bill, S. 2573, 87th Cong., 1st Sess., provided that the Sherman Act be amended to read in part:

"Notwithstanding any other provision of law, every contract, agreement, or understanding, express or implied, between any labor organization and any employer engaged in the transportation of persons or property, whereby such employer undertakes to cease, or to refrain from, purchasing, using, selling, handling, transporting, or otherwise dealing in any of the products or services of any producer, processor, distributor, supplier, handler, or manufacturer which are distributed in trade or commerce in any territory of the United States or the District of Columbia, or between any such territory and another, or between any such territory or territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations, or to cease doing business with any other person shall be unlawful."

intended to subject such activity only to regulation under the National Labor Relations Act and § 303 of the Labor Management Relations Act. The judicial imposition of "independent federal remedies" not intended by Congress, no less than the application of state law to union conduct that is either protected or prohibited by federal labor law,[13] threatens "to upset the balance of power between labor and management expressed in our national labor policy." *Teamsters* v. *Morton,* 377 U. S., at 260. See *Carpenters* v. *NLRB,* 357 U. S., at 98–100; *National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U. S., at 619–620. Accordingly, the judgment before us should be affirmed.

[13] I fully agree with the Court's conclusion, *ante,* at 635–637, that federal labor law pre-empts the state law that Connell sought to apply to Local 100's secondary activity in this case.

CONNOR ET AL. *v.* WALLER, GOVERNOR OF MISSISSIPPI, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 74–1509. Decided June 5, 1975.

The District Court's error in holding that certain Mississippi statutes do not have to be submitted for clearance pursuant to § 5 of the Voting Rights Act of 1965, and its consequent error in deciding the constitutional challenges to the statutes based on racial discrimination claims, require reversal; but this is without prejudice to that court's authority to entertain an appropriate proceeding to require that the 1975 elections be conducted pursuant to a court-ordered reapportionment plan.

396 F. Supp. 1308, reversed.

PER CURIAM.

This is an appeal from a judgment entered May 22, 1975, by a three-judge court for the Southern District of Mississippi. The judgment is reversed. The District Court erred in holding that House Bill No. 1290 and Senate Bill No. 2976, Mississippi Laws, 1975, Regular Session, are not legislative enactments required to be submitted pursuant to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 84 Stat. 315, 42 U. S. C. § 1973c. *Georgia* v. *United States,* 411 U. S. 526 (1973). Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5. The District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination. *Perkins* v. *Matthews,* 400 U. S. 379 (1971); *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969).

This reversal is, however, without prejudice to the authority of the District Court, if it should become ap-

propriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell,* 410 U. S. 315 (1973); *Connor* v. *Williams,* 404 U. S. 549 (1972); and *Chapman* v. *Meier,* 420 U. S. 1 (1975).

Reversed.

MR. JUSTICE MARSHALL, concurring.

I am of the opinion that the *per curiam* in this case should be made clear by adding a paragraph similar to the concluding paragraph of our opinion in *Georgia* v. *United States,* 411 U. S. 526, 541 (1973). Therefore, I would add the following paragraph in this case:

> "The case is remanded with instructions that any future elections in Mississippi under House Bill No. 1290 and Senate Bill No. 2976, Mississippi Laws, 1975, Regular Session, be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act of 1965, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia."

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal.

UNITED STATES *v.* PARK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-215. Argued March 18-19, 1975—Decided June 9, 1975

Acme Markets, Inc., a large national food chain, and respondent, its president, were charged with violating § 301 (k) of the Federal Food, Drug, and Cosmetic Act (Act) in an information alleging that they had caused interstate food shipments being held in Acme's Baltimore warehouse to be exposed to rodent contamination. Acme, but not respondent, pleaded guilty. At his trial respondent conceded that providing sanitary conditions for food offered for sale to the public was something that he was "responsible for in the entire operation of the company," and that it was one of the many phases of the company that he assigned to "dependable subordinates." Evidence was admitted over respondent's objection that he had received a Food and Drug Administration (FDA) letter in 1970 concerning insanitary conditions at Acme's Philadelphia warehouse. Respondent conceded that the same individuals were largely responsible for sanitation in both Baltimore and Philadelphia, and that as Acme's president he was responsible for any result that occurred in the company. The trial court, *inter alia*, instructed the jury that although respondent need not have personally participated in the situation, he must have had "a responsible relationship to the issue." Respondent was convicted, but the Court of Appeals reversed, reasoning that although this Court's decision in *United States* v. *Dotterweich*, 320 U. S. 277, had construed the statutory provisions under which respondent had been tried to dispense with the traditional element of "'awareness of some wrongdoing,'" the Court had not construed them as dispensing with the element of "wrongful action." The Court of Appeals concluded that the trial court's instructions "might well have left the jury with the erroneous impression that [respondent] could be found guilty in the absence of 'wrongful action' on his part," and that proof of that element was required by due process. The court also held that the admission in evidence of the 1970 FDA warning to respondent was reversible error. *Held:*

1. The Act imposes upon persons exercising authority and

supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also, and primarily, a duty to implement measures that will insure that violations will not occur, *United States* v. *Dotterweich, supra;* in order to make food distributors "the strictest censors of their merchandise," *Smith* v. *California,* 361 U. S. 147, 152, the Act punishes "neglect where the law requires care, or inaction where it imposes a duty." *Morissette* v. *United States,* 342 U. S. 246, 255. Pp. 670–673.

2. Viewed as a whole and in context, the trial court's instructions were not misleading and provided a proper guide for the jury's determination. The charge adequately focused on the issue of respondent's authority respecting the conditions that formed the basis of the alleged violations, fairly advising the jury that to find guilt it must find that respondent "had a responsible relation to the situation"; that the "situation" was the condition of the warehouse; and that by virtue of his position he had "authority and responsibility" to deal therewith. Pp. 673–676.

3. The admission of testimony concerning the 1970 FDA warning was proper rebuttal evidence to respondent's defense that he had justifiably relied upon subordinates to handle sanitation matters. Pp. 676–678.

499 F. 2d 839, reversed.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. STEWART, J., filed a dissenting opinion, in which MARSHALL and POWELL, JJ., joined, *post,* p. 678.

Allan Abbott Tuttle argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Kauper, Howard E. Shapiro,* and *Peter Barton Hutt.*

Gregory M. Harvey argued the cause for respondent. With him on the brief was *Orvel Sebring.**

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*Briefs of *amici curiae* urging affirmance were filed by *James F. Rill, Robert A. Collier,* and *John Hardin Young* for the National Association of Food Chains; by *H. Thomas Austern, H. Edward Dunkelberger, Jr.,* and *Geoffrey Richard Wagner Smith* for the

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the jury instructions in the prosecution of a corporate officer under § 301 (k) of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1042, as amended, 21 U. S. C. § 331 (k), were appropriate under *United States* v. *Dotterweich*, 320 U. S. 277 (1943).

Acme Markets, Inc., is a national retail food chain with approximately 36,000 employees, 874 retail outlets, 12 general warehouses, and four special warehouses. Its headquarters, including the office of the president, respondent Park, who is chief executive officer of the corporation, are located in Philadelphia, Pa. In a five-count information filed in the United States District Court for the District of Maryland, the Government charged Acme and respondent with violations of the Federal Food, Drug, and Cosmetic Act. Each count of the information alleged that the defendants had received food that had been shipped in interstate commerce and that, while the food was being held for sale in Acme's Baltimore warehouse following shipment in interstate commerce, they caused it to be held in a building accessible to rodents and to be exposed to contamination by rodents. These acts were alleged to have resulted in the food's being adulterated within the meaning of 21 U. S. C. §§ 342 (a)(3) and (4),[1] in violation of 21 U. S. C. § 331 (k).[2]

National Canners Assn.; by *Robert C. Barnard* and *Charles F. Lettow* for the Synthetic Organic Chemical Manufacturers Assn.; and by *Frederick M. Rowe, Paul M. Hyman,* and *Jonathan W. Sloat* for the Grocery Manufacturers of America, Inc.

[1] Section 402 of the Act, 21 U. S. C. § 342, provides in pertinent part:

"A food shall be deemed to be adulterated—

"(a) . . . (3) if it consists in whole or in part of any filthy, putrid,

[*Footnote 2 is on p. 661*]

Acme pleaded guilty to each count of the information. Respondent pleaded not guilty. The evidence at trial [3] demonstrated that in April 1970 the Food and Drug Administration (FDA) advised respondent by letter of insanitary conditions in Acme's Philadelphia warehouse. In 1971 the FDA found that similar conditions existed in the firm's Baltimore warehouse. An FDA consumer safety officer testified concerning evidence of rodent infestation and other insanitary conditions discovered during a 12-day inspection of the Baltimore warehouse in November and December 1971.[4] He also related that a

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or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health . . . ."

[2] Section 301 of the Act, 21 U. S. C. § 331, provides in pertinent part:

"The following acts and the causing thereof are prohibited:

. . . . . .

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[3] The parties stipulated in effect that the items of food described in the information had been shipped in interstate commerce and were being held for sale in Acme's Baltimore warehouse.

[4] The witness testified with respect to the inspection of the basement of the "old building" in the warehouse complex:

"We found extensive evidence of rodent infestation in the form of rat and mouse pellets throughout the entire perimeter area and along the wall.

"We also found that the doors leading to the basement area from the rail siding had openings at the bottom or openings beneath part of the door that came down at the bottom large enough to admit rodent entry. There were also roden[t] pellets found on a number of different packages of boxes of various items stored in the base-

second inspection of the warehouse had been conducted in March 1972.[5] On that occasion the inspectors found that there had been improvement in the sanitary conditions, but that "there was still evidence of rodent activity in the building and in the warehouses and we found some rodent-contaminated lots of food items." App. 23.

The Government also presented testimony by the Chief of Compliance of the FDA's Baltimore office, who informed respondent by letter of the conditions at the Baltimore warehouse after the first inspection.[6] There was testimony by Acme's Baltimore division vice president, who had responded to the letter on behalf of Acme and respondent and who described the steps taken to remedy the insanitary conditions discovered by both inspections. The Government's final witness, Acme's vice president for legal affairs and assistant secretary, identi-

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ment, and looking at this document, I see there were also broken windows along the rail siding." App. 20–21.

On the first floor of the "old building," the inspectors found:

"Thirty mouse pellets on the floor along walls and on the ledge in the hanging meat room. There were at least twenty mouse pellets beside bales of lime Jello and one of the bales had a chewed rodent hole in the product. . . ." *Id.*, at 22.

[5] The first four counts of the information alleged violations corresponding to the observations of the inspectors during the November and December 1971 inspection. The fifth count alleged violations corresponding to observations during the March 1972 inspection.

[6] The letter, dated January 27, 1972, included the following:

"We note with much concern that the old and new warehouse areas used for food storage were actively and extensively inhabited by live rodents. Of even more concern was the observation that such reprehensible conditions obviously existed for a prolonged period of time without any detection, or were completely ignored. . . .

. . . . .

"We trust this letter will serve to direct your attention to the seriousness of the problem and formally advise you of the urgent need to initiate whatever measures are necessary to prevent recurrence and ensure compliance with the law." *Id.*, at 64–65.

fied respondent as the president and chief executive officer of the company and read a bylaw prescribing the duties of the chief executive officer.[7] He testified that respondent functioned by delegating "normal operating duties," including sanitation, but that he retained "certain things, which are the big, broad, principles of the operation of the company," and had "the responsibility of seeing that they all work together." *Id.*, at 41.

At the close of the Government's case in chief, respondent moved for a judgment of acquittal on the ground that "the evidence in chief has shown that Mr. Park is not personally concerned in this Food and Drug violation." The trial judge denied the motion, stating that *United States* v. *Dotterweich*, 320 U. S. 277 (1943), was controlling.

Respondent was the only defense witness. He testified that, although all of Acme's employees were in a sense under his general direction, the company had an "organizational structure for responsibilities for certain functions" according to which different phases of its operation were "assigned to individuals who, in turn, have staff and departments under them." He identified those individuals responsible for sanitation, and related that upon receipt of the January 1972 FDA letter, he had conferred with the vice president for legal affairs,

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[7] The bylaw provided in pertinent part:

"The Chairman of the board of directors or the president shall be the chief executive officer of the company as the board of directors may from time to time determine. He shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company. . . .

"He shall, from time to time, in his discretion or at the order of the board, report the operations and affairs of the company. He shall also perform such other duties and have such other powers as may be assigned to him from time to time by the board of directors." *Id.*, at 40.

who informed him that the Baltimore division vice president "was investigating the situation immediately and would be taking corrective action and would be preparing a summary of the corrective action to reply to the letter." Respondent stated that he did not "believe there was anything [he] could have done more constructively than what [he] found was being done." App. 43–47.

On cross-examination, respondent conceded that providing sanitary conditions for food offered for sale to the public was something that he was "responsible for in the entire operation of the company," and he stated that it was one of many phases of the company that he assigned to "dependable subordinates." Respondent was asked about and, over the objections of his counsel, admitted receiving, the April 1970 letter addressed to him from the FDA regarding insanitary conditions at Acme's Philadelphia warehouse.[8] He acknowledged that, with the exception of the division vice president, the same individuals had responsibility for sanitation in both Baltimore and Philadelphia. Finally, in response to questions concerning the Philadelphia and Baltimore incidents, respondent admitted that the Baltimore problem indicated the system for handling sanitation "wasn't

[8] The April 1970 letter informed respondent of the following "objectionable conditions" in Acme's Philadelphia warehouse:

"1. Potential rodent entry ways were noted via ill fitting doors and door in irrepair at Southwest corner of warehouse; at dock at old salvage room and at receiving and shipping doors which were observed to be open most of the time.

"2. Rodent nesting, rodent excreta pellets, rodent stained bale bagging and rodent gnawed holes were noted among bales of flour stored in warehouse.

"3. Potential rodent harborage was noted in discarded paper, rope, sawdust and other debris piled in corner of shipping and receiving dock near bakery and warehouse doors. Rodent excreta pellets were observed among bags of sawdust (or wood shavings)." *Id.*, at 70.

working perfectly" and that as Acme's chief executive officer he was responsible for "any result which occurs in our company." *Id.*, at 48–55.

At the close of the evidence, respondent's renewed motion for a judgment of acquittal was denied. The relevant portion of the trial judge's instructions to the jury challenged by respondent is set out in the margin.[9] Respondent's counsel objected to the instructions on the ground that they failed fairly to reflect our decision in *United States* v. *Dotterweich*, *supra*, and to define "'responsible relationship.'" The trial judge over-

[9] "In order to find the Defendant guilty on any count of the Information, you must find beyond a reasonable doubt on each count . . . .

. . . . . .

"Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated.

"However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.

. . . . . .

"The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. As I have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally.

"The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is pres[id]ent and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose." *Id.*, at 61–62.

ruled the objection. The jury found respondent guilty on all counts of the information, and he was subsequently sentenced to pay a fine of $50 on each count.[10]

The Court of Appeals reversed the conviction and remanded for a new trial. That court viewed the Government as arguing "that the conviction may be predicated solely upon a showing that . . . [respondent] was the President of the offending corporation," and it stated that as "a general proposition, some act of commission or omission is an essential element of every crime." 499 F. 2d 839, 841 (CA4 1974). It reasoned that, although our decision in *United States* v. *Dotterweich, supra,* at 281, had construed the statutory provisions under which respondent was tried to dispense with the traditional element of " 'awareness of some wrongdoing,' " the Court had not construed them as dispensing with the element of "wrongful action." The Court of Appeals concluded that the trial judge's instructions "might well have left the jury with the erroneous impression that Park could be found guilty in the absence of 'wrongful action' on his part," 499 F. 2d, at 841–842, and that proof of this element was required by due process. It held, with one

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[10] Sections 303 (a) and (b) of the Act, 21 U. S. C. §§ 333 (a) and (b), provide:

"(a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

"(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than $10,000, or both."

Respondent's renewed motion for a judgment of acquittal or in the alternative for a new trial, one of the grounds of which was the alleged abuse of discretion in the initiation of the prosecution against him, had previously been denied after argument.

dissent, that the instructions did not "correctly state the law of the case," *id.*, at 840, and directed that on retrial the jury be instructed as to "wrongful action," which might be "gross negligence and inattention in discharging . . . corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of food." *Id.*, at 842. (Footnotes omitted.)

The Court of Appeals also held that the admission in evidence of the April 1970 FDA warning to respondent was error warranting reversal, based on its conclusion that, "as this case was submitted to the jury and in light of the sole issue presented," there was no need for the evidence and thus that its prejudicial effect outweighed its relevancy under the test of *United States* v. *Woods*, 484 F. 2d 127 (CA4 1973), cert. denied, 415 U. S. 979 (1974). 499 F. 2d, at 843.

We granted certiorari because of an apparent conflict among the Courts of Appeals with respect to the standard of liability of corporate officers under the Federal Food, Drug, and Cosmetic Act as construed in *United States* v. *Dotterweich, supra*, and because of the importance of the question to the Government's enforcement program. We reverse.

I

The question presented by the Government's petition for certiorari in *United States* v. *Dotterweich, supra*, and the focus of this Court's opinion, was whether "the manager of a corporation, as well as the corporation itself, may be prosecuted under the Federal Food, Drug, and Cosmetic Act of 1938 for the introduction of misbranded and adulterated articles into interstate commerce." Pet. for Cert., No. 5, O. T. 1943, p. 2. In *Dotterweich*, a jury had disagreed as to the corporation, a jobber purchasing drugs from manu-

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facturers and shipping them in interstate commerce under its own label, but had convicted Dotterweich, the corporation's president and general manager. The Court of Appeals reversed the conviction on the ground that only the drug dealer, whether corporation or individual, was subject to the criminal provisions of the Act, and that where the dealer was a corporation, an individual connected therewith might be held personally only if he was operating the corporation "as his 'alter ego.'" *United States* v. *Buffalo Pharmacal Co.*, 131 F. 2d 500, 503 (CA2 1942).[11]

In reversing the judgment of the Court of Appeals and reinstating Dotterweich's conviction, this Court looked to the purposes of the Act and noted that they "touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." 320 U. S., at 280. It observed that the Act is of "a now familiar type" which "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.*, at 280–281.

Central to the Court's conclusion that individuals other than proprietors are subject to the criminal provisions of the Act was the reality that "the only way in which a corporation can act is through the individuals who act on its behalf." *Id.*, at 281. The Court

[11] The Court of Appeals relied upon § 303 (c) of the Act, 21 U. S. C. § 333 (c), which extended immunity from the penalties provided by § 303 (a) to a person who could establish a guaranty "signed by, and containing the name and address of, the person residing in the United States *from whom he received* in good faith the article . . . ." (Emphasis added.) The court reasoned that where the drug dealer was a corporation, the protection of § 303 (c) would extend only to such dealer and not to its employees.

also noted that corporate officers had been subject to criminal liability under the Federal Food and Drugs Act of 1906,[12] and it observed that a contrary result under the 1938 legislation would be incompatible with the expressed intent of Congress to "enlarge and stiffen the penal net" and to discourage a view of the Act's criminal penalties as a " 'license fee for the conduct of an illegitimate business.' " 320 U. S., at 282–283. (Footnote omitted.)

At the same time, however, the Court was aware of the concern which was the motivating factor in the Court of Appeals' decision, that literal enforcement "might operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment." *Id.,* at 284. A limiting principle, in the form of "settled doctrines of criminal law" defining those who "are responsible for the commission of a misdemeanor," was available. In this context, the Court concluded, those doctrines dictated that the offense was committed "by all who . . . have . . . a responsible share in the furtherance of the transaction which the statute outlaws." *Ibid.*

The Court recognized that, because the Act dispenses with the need to prove "consciousness of wrongdoing," it may result in hardship even as applied to those who share "responsibility in the business process resulting in" a violation. It regarded as "too treacherous" an attempt "to define or even to indicate by way of illustration the class of employees which stands in such a responsible relation." The question of responsibility, the Court said, depends "on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." The Court added: "In such matters the good sense of prosecutors, the wise guidance of trial judges, and the ulti-

[12] Act of June 30, 1906, c. 3915, 34 Stat. 768.

mate judgment of juries must be trusted." *Id.*, at 284–285.[13] See 21 U. S. C. § 336. Cf. *United States* v. *Sullivan*, 332 U. S. 689, 694–695 (1948).

II

The rule that corporate employees who have "a responsible share in the furtherance of the transaction which the statute outlaws" are subject to the criminal provisions of the Act was not formulated in a vacuum. Cf. *Morissette* v. *United States*, 342 U. S. 246, 258 (1952). Cases under the Federal Food and Drugs Act of 1906 reflected the view both that knowledge or intent were not required to be proved in prosecutions under its criminal provisions, and that responsible corporate agents could be subjected to the liability thereby imposed. See, *e. g.*, *United States* v. *Mayfield*, 177 F. 765 (ND Ala. 1910). Moreover, the principle had been recognized that a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime. The principle had been applied whether or not the crime required "consciousness of wrongdoing," and it had been applied not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission.

In the latter class of cases, the liability of managerial officers did not depend on their knowledge of, or personal participation in, the act made criminal by the statute.

[13] In reinstating Dotterweich's conviction, the Court stated: "For present purpose it suffices to say that in what the defense characterized as 'a very fair charge' the District Court properly left the question of the responsibility of Dotterweich for the shipment to the jury, and there was sufficient evidence to support its verdict." 320 U. S., at 285.

Rather, where the statute under which they were prosecuted dispensed with "consciousness of wrongdoing," an omission or failure to act was deemed a sufficient basis for a responsible corporate agent's liability. It was enough in such cases that, by virtue of the relationship he bore to the corporation, the agent had the power to prevent the act complained of. See, *e. g.*, *State* v. *Burnam*, 71 Wash. 199, 128 P. 218 (1912); *Overland Cotton Mill Co.* v. *People*, 32 Colo. 263, 75 P. 924 (1904). Cf. *Groff* v. *State*, 171 Ind. 547, 85 N. E. 769 (1908); *Turner* v. *State*, 171 Tenn. 36, 100 S. W. 2d 236 (1937); *People* v. *Schwartz*, 28 Cal. App. 2d 775, 70 P. 2d 1017 (1937); Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689 (1930).

The rationale of the interpretation given the Act in *Dotterweich*, as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of, has been confirmed in our subsequent cases. Thus, the Court has reaffirmed the proposition that "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors." *Smith* v. *California*, 361 U. S. 147, 152 (1959). In order to make "distributors of food the strictest censors of their merchandise," *ibid.*, the Act punishes "neglect where the law requires care, or inaction where it imposes a duty." *Morissette* v. *United States*, *supra*, at 255. "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities." *Id.*, at 256. Cf. Hughes, Criminal Omissions, 67 Yale L. J. 590 (1958). Similarly, in cases decided after *Dotterweich*, the

Courts of Appeals have recognized that those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a "responsible relationship" to, or have a "responsible share" in, violations.[14]

Thus *Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission—and this is by no means necessarily confined to a single corporate agent or employee—the Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them. Cf. Wasserstrom, Strict Liability in the Criminal Law, 12 Stan. L. Rev. 731, 741–745 (1960).[15]

The Act does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrong-

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[14] See, *e. g.*, *Lelles* v. *United States*, 241 F. 2d 21 (CA9), cert. denied, 353 U. S. 974 (1957); *United States* v. *Kaadt*, 171 F. 2d 600 (CA7 1948). Cf. *United States* v. *Shapiro*, 491 F. 2d 335, 337 (CA6 1974); *United States* v. *3963 Bottles*, 265 F. 2d 332 (CA7), cert. denied, 360 U. S. 931 (1959); *United States* v. *Klehman*, 397 F. 2d 406 (CA7 1968).

[15] We note that in 1948 the Senate passed an amendment to § 303 (a) of the Act to impose criminal liability only for violations committed "willfully or as a result of gross negligence." 94 Cong. Rec. 6760–6761 (1948). However, the amendment was subsequently stricken in conference. *Id.*, at 8551, 8838.

doing" or "conscious fraud." The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the Act, in its criminal aspect, does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." *United States* v. *Wiesenfeld Warehouse Co.*, 376 U. S. 86, 91 (1964). If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition. Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.

III

We cannot agree with the Court of Appeals that it was incumbent upon the District Court to instruct the jury that the Government had the burden of establishing "wrongful action" in the sense in which the Court of Appeals used that phrase. The concept of a "responsible relationship" to, or a "responsible share" in, a violation of the Act indeed imports some measure of blameworthiness; but it is equally clear that the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the

corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so. The failure thus to fulfill the duty imposed by the interaction of the corporate agent's authority and the statute furnishes a sufficient causal link. The considerations which prompted the imposition of this duty, and the scope of the duty, provide the measure of culpability.

Turning to the jury charge in this case, it is of course arguable that isolated parts can be read as intimating that a finding of guilt could be predicated solely on respondent's corporate position. But this is not the way we review jury instructions, because "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U. S. 141, 146–147 (1973). See *Boyd* v. *United States*, 271 U. S. 104, 107 (1926).

Reading the entire charge satisfies us that the jury's attention was adequately focused on the issue of respondent's authority with respect to the conditions that formed the basis of the alleged violations. Viewed as a whole, the charge did not permit the jury to find guilt solely on the basis of respondent's position in the corporation; rather, it fairly advised the jury that to find guilt it must find respondent "had a responsible relation to the situation," and "by virtue of his position . . . had . . . authority and responsibility" to deal with the situation. The situation referred to could only be "food . . . held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or . . . may have been contaminated with filth."

Moreover, in reviewing jury instructions, our task is also to view the charge itself as part of the whole trial. "Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered

in the context of the entire record of the *trial.*" *United States* v. *Birnbaum,* 373 F. 2d 250, 257 (CA2), cert. denied, 389 U. S. 837 (1967). (Emphasis added.) Cf. *Cupp* v. *Naughten, supra.* The record in this case reveals that the jury could not have failed to be aware that the main issue for determination was not respondent's position in the corporate hierarchy, but rather his accountability, because of the responsibility and authority of his position, for the conditions which gave rise to the charges against him.[16]

We conclude that, viewed as a whole and in the context of the trial, the charge was not misleading and contained an adequate statement of the law to guide the jury's determination. Although it would have been better to give an instruction more precisely relating the legal issue to the facts of the case, we cannot say that the failure to provide the amplification requested by respondent was an abuse of discretion. See *United*

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[16] In his summation to the jury, the prosecutor argued:

"That brings us to the third question that you must decide, and that is whether Mr. John R. Park is responsible for the conditions persisting. . . .

. . . . . .

"The point is that, while Mr. Park apparently had a system, and I think he testified the system had been set up long before he got there—he did say that if anyone was going to change the system, it was his responsibility to do so. That very system, the system that he didn't change, did not work in March of 1970 in Philadelphia; it did not work in November of 1971 in Baltimore; it did not work in March of 1972 in Baltimore, and under those circumstances, I submit, that Mr. Park is the man responsible. . . .

. . . . . .

"Mr. Park was responsible for seeing that sanitation was taken care of, and he had a system set up that was supposed to do that. This system didn't work. It didn't work three times. At some point in time, Mr. Park has to be held responsible for the fact that his system isn't working . . . ." App. 57, 59, 60.

States v. *Bayer*, 331 U. S. 532, 536–537 (1947); *Holland* v. *United States*, 348 U. S. 121, 140 (1954). Finally, we note that there was no request for an instruction that the Government was required to prove beyond a reasonable doubt that respondent was not without the power or capacity to affect the conditions which founded the charges in the information.[17] In light of the evidence adduced at trial, we find no basis to conclude that the failure of the trial court to give such an instruction *sua sponte* was plain error or a defect affecting substantial rights. Fed. Rule Crim. Proc. 52 (b). Compare *Lopez* v. *United States*, 373 U. S. 427, 436 (1963), with *Screws* v. *United States*, 325 U. S. 91, 107 (1945) (opinion of DOUGLAS, J.).

IV

Our conclusion that the Court of Appeals erred in its reading of the jury charge suggests as well our disagreement with that court concerning the admissibility of evidence demonstrating that respondent was advised by the FDA in 1970 of insanitary conditions in Acme's Philadelphia warehouse. We are satisfied that the Act imposes the highest standard of care and permits conviction of responsible corporate officials who, in light of this standard of care, have the power to prevent or correct violations of its provisions. Implicit in the Court's admonition that "the ultimate judgment of juries must be trusted," *United States* v. *Dotterweich*, 320 U. S., at 285, however, is the realization that they may demand more than corporate bylaws to find culpability.

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[17] Counsel for respondent submitted only two requests for charge: (1) "Statutes such as the ones the Government seeks to apply here are criminal statutes and should be strictly construed," and (2) "The fact that John Park is President and Chief Executive Officer of Acme Markets, Inc. does not of itself justify a finding of guilty under Counts I through V of the Information." 1 Record 56–57.

Respondent testified in his defense that he had employed a system in which he relied upon his subordinates, and that he was ultimately responsible for this system. He testified further that he had found these subordinates to be "dependable" and had "great confidence" in them. By this and other testimony respondent evidently sought to persuade the jury that, as the president of a large corporation, he had no choice but to delegate duties to those in whom he reposed confidence, that he had no reason to suspect his subordinates were failing to insure compliance with the Act, and that, once violations were unearthed, acting through those subordinates he did everything possible to correct them.[18]

Although we need not decide whether this testimony would have entitled respondent to an instruction as to his lack of power, see *supra*, at 676, had he requested it,[19] the testimony clearly created the "need" for rebuttal evidence. That evidence was not offered to show that respondent had a propensity to commit criminal acts, cf. *Michelson* v. *United States*, 335 U. S. 469, 475–476 (1948), or, as in *United States* v. *Woods*, 484 F. 2d 127, that the crime charged had been committed; its purpose

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[18] In his summation to the jury, counsel for respondent argued:

"Now, you are Mr. Park. You have his responsibility for a thousand stores—I think eight hundred and some stores—lots of stores, many divisions, many warehouses. What are you going to do, except hire people in whom you have confidence to whom you delegate the work? . . .

. . . . . .

". . . What I am saying to you is that Mr. Park, through his subordinates, when this was found out, did everything in the world they [*sic*] could." 3 Record 201, 207.

[19] Assuming, *arguendo*, that it would be objectively impossible for a senior corporate agent to control fully day-to-day conditions in 874 retail outlets, it does not follow that such a corporate agent could not prevent or remedy promptly violations of elementary sanitary conditions in 16 regional warehouses.

was to demonstrate that respondent was on notice that he could not rely on his system of delegation to subordinates to prevent or correct insanitary conditions at Acme's warehouses, and that he must have been aware of the deficiencies of this system before the Baltimore violations were discovered. The evidence was therefore relevant since it served to rebut respondent's defense that he had justifiably relied upon subordinates to handle sanitation matters. Cf. *United States* v. *Ross*, 321 F. 2d 61, 67 (CA2), cert. denied, 375 U. S. 894 (1963); E. Cleary, McCormick on Evidence § 190, pp. 450–452 (2d ed. 1972). And, particularly in light of the difficult task of juries in prosecutions under the Act, we conclude that its relevance and persuasiveness outweighed any prejudicial effect. Cf. *Research Laboratories, Inc.* v. *United States*, 167 F. 2d 410, 420–421 (CA9), cert. denied, 335 U. S. 843 (1948).

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL and MR. JUSTICE POWELL join, dissenting.

Although agreeing with much of what is said in the Court's opinion, I dissent from the opinion and judgment, because the jury instructions in this case were not consistent with the law as the Court today expounds it.

As I understand the Court's opinion, it holds that in order to sustain a conviction under § 301 (k) of the Federal Food, Drug, and Cosmetic Act the prosecution must at least show that by reason of an individual's corporate position and responsibilities, he had a duty to use care to maintain the physical integrity of the corporation's food products. A jury may then draw the inference that when the food is found to be in such condition as to violate the statute's prohibitions, that condition was "caused" by a breach of the standard of care imposed upon the

responsible official. This is the language of negligence, and I agree with it.

To affirm this conviction, however, the Court must approve the instructions given to the members of the jury who were entrusted with determining whether the respondent was innocent or guilty. Those instructions did not conform to the standards that the Court itself sets out today.

The trial judge instructed the jury to find Park guilty if it found beyond a reasonable doubt that Park "had a responsible relation to the situation . . . . The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose." Requiring, as it did, a verdict of guilty upon a finding of "responsibility," this instruction standing alone could have been construed as a direction to convict if the jury found Park "responsible" for the condition in the sense that his position as chief executive officer gave him formal responsibility within the structure of the corporation. But the trial judge went on specifically to caution the jury not to attach such a meaning to his instruction, saying that "the fact that the Defendant is pres[id]ent and is a chief executive officer of the Acme Markets does not require a finding of guilt." "Responsibility" as used by the trial judge therefore had whatever meaning the jury in its unguided discretion chose to give it.

The instructions, therefore, expressed nothing more than a tautology. They told the jury: "You must find the defendant guilty if you find that he is to be held accountable for this adulterated food." In other words: "You must find the defendant guilty if you conclude that he is guilty." The trial judge recognized the infirmities in these instructions, but he reluctantly con-

cluded that he was required to give such a charge under *United States* v. *Dotterweich*, 320 U. S. 277, which, he thought, in declining to define "responsible relation" had declined to specify the minimum standard of liability for criminal guilt.[1]

As the Court today recognizes, the *Dotterweich* case did not deal with what kind of conduct must be proved to support a finding of criminal guilt under the Act. *Dotterweich* was concerned, rather, with the statutory definition of "person"—with what kind of corporate employees were even "subject to the criminal provisions of the Act." *Ante*, at 670. The Court held that those employees with "a responsible relation" to the violative transaction or condition were subject to the Act's criminal provisions, but all that the Court had to say with respect to the kind of conduct that can constitute criminal guilt was that the Act "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." 320 U. S., at 281.

In approving the instructions to the jury in this case—instructions based upon what the Court concedes was a misunderstanding of *Dotterweich*—the Court approves a conspicuous departure from the long and firmly established division of functions between judge and jury in the administration of criminal justice. As the Court put the matter more than 80 years ago:

> "We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries

[1] In response to a request for further illumination of what he meant by "responsible relationship" the District Judge said:

"Let me say this, simply as to the definition of the 'responsible relationship.' Dotterweich and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court. As I have indicated to counsel, I am quite candid in stating that I do not agree with the decision; therefore, I am going to stick by it."

> in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men. Liberty regulated by law is the underlying principle of our institutions." *Sparf* v. *United States,* 156 U. S. 51, 102–103.

More recently the Court declared unconstitutional a procedure whereby a jury, having acquitted a defendant of a misdemeanor, was instructed to impose upon him such costs of the prosecution as it deemed appropriate to his degree of "responsibility." *Giaccio* v. *Pennsylvania,* 382 U. S. 399. The state statute under which the procedure was authorized was invalidated because it left "to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Id.,* at 403. And in *Jackson* v. *Denno,* 378 U. S. 368, the Court found unconstitutional a procedure whereby a jury was permitted to decide the question of the voluntariness of a confession along with the question of guilt, in part because that procedure permitted the submergence of a question of law, as to which appellate review was constitutionally required, in the general deliberations of a jury.

These cases no more than embody a principle fundamental to our jurisprudence: that a jury is to decide the facts and apply to them the law as explained by the trial judge. Were it otherwise, trial by jury would be no more rational and no more responsive to the accumulated wisdom of the law than trial by ordeal. It is the function of jury instructions, in short, to establish in any trial the objective standards that a jury is to apply as it performs its own function of finding the facts.

To be sure, "the day [is] long past when [courts] . . . parsed instructions and engaged in nice semantic distinctions," *Cool* v. *United States*, 409 U. S. 100, 107 (REHNQUIST, J., dissenting). But this Court has never before abandoned the view that jury instructions must contain a statement of the applicable law sufficiently precise to enable the jury to be guided by something other than its rough notions of social justice. And while it might be argued that the issue before the jury in this case was a "mixed" question of both law and fact, this has never meant that a jury is to be left wholly at sea, without any guidance as to the standard of conduct the law requires. The instructions given by the trial court in this case, it must be emphasized, were a virtual nullity, a mere authorization to convict if the jury thought it appropriate. Such instructions—regardless of the blameworthiness of the defendant's conduct, regardless of the social value of the Food, Drug, and Cosmetic Act, and regardless of the importance of convicting those who violate it—have no place in our jurisprudence.

We deal here with a criminal conviction, not a civil forfeiture. It is true that the crime was but a misdemeanor and the penalty in this case light. But under the statute even a first conviction can result in imprisonment for a year, and a subsequent offense is a felony

carrying a punishment of up to three years in prison.[2] So the standardless conviction approved today can serve in another case tomorrow to support a felony conviction and a substantial prison sentence. However highly the Court may regard the social objectives of the Food, Drug, and Cosmetic Act, that regard cannot serve to justify a criminal conviction so wholly alien to fundamental principles of our law.

The *Dotterweich* case stands for two propositions, and I accept them both. First, "any person" within the meaning of 21 U. S. C. § 333 may include any corporate officer or employee "standing in responsible relation" to a condition or transaction forbidden by the Act. 320 U. S., at 281. Second, a person may be convicted of a criminal offense under the Act even in the absence of "the conventional requirement for criminal conduct—awareness of some wrongdoing." *Ibid.*

But before a person can be convicted of a criminal violation of this Act, a jury must find—and must be clearly instructed that it must find—evidence beyond a reasonable doubt that he engaged in wrongful conduct amounting at least to common-law negligence. There were no such instructions, and clearly, therefore, no such finding in this case.[3]

For these reasons, I cannot join the Court in affirming Park's criminal conviction.

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[2] See *ante*, at 666 n. 10.

[3] This is not to say that Park might not be found guilty by a properly instructed jury in a new trial. But that, of course, is not the point. "Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges." *Morissette* v. *United States*, 342 U. S. 246, 276.

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MULLANEY ET AL. *v.* WILBUR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 74–13. Argued January 15, 1975—Decided June 9, 1975

The State of Maine requires a defendant charged with murder, which upon conviction carries a mandatory sentence of life imprisonment, to prove that he acted in the heat of passion on sudden provocation in order to reduce the homicide to manslaughter, in which case the punishment is a fine or imprisonment not exceeding 20 years. *Held:* The Maine rule does not comport with the requirement of the Due Process Clause of the Fourteenth Amendment that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged, *In re Winship*, 397 U. S. 358. To satisfy that requirement the prosecution in a homicide case in Maine must prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented. Pp. 691–704.

496 F. 2d 1303, affirmed.

POWELL, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 704.

Vernon I. Arey, Assistant Attorney General of Maine, argued the cause for petitioners. With him on the brief were *Jon A. Lund*, Attorney General, *Richard S. Cohen*, Deputy Attorney General, and *Charles K. Leadbetter*, Assistant Attorney General.

Peter J. Rubin, by appointment of the Court, 419 U. S. 1017, argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

The State of Maine requires a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to

manslaughter. We must decide whether this rule comports with the due process requirement, as defined in *In re Winship*, 397 U. S. 358, 364 (1970), that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.

I

In June 1966 a jury found respondent Stillman E. Wilbur, Jr., guilty of murder. The case against him rested on his own pretrial statement and on circumstantial evidence showing that he fatally assaulted Claude Hebert in the latter's hotel room. Respondent's statement, introduced by the prosecution, claimed that he had attacked Hebert in a frenzy provoked by Hebert's homosexual advance. The defense offered no evidence, but argued that the homicide was not unlawful since respondent lacked criminal intent. Alternatively, Wilbur's counsel asserted that at most the homicide was manslaughter rather than murder, since it occurred in the heat of passion provoked by the homosexual assault.

The trial court instructed the jury that Maine law recognizes two kinds of homicide, murder and manslaughter, and that these offenses are not subdivided into different degrees. The common elements of both are that the homicide be unlawful—*i. e.*, neither justifiable nor excusable [1]—and that it be intentional.[2] The prosecution is required to prove these elements by proof beyond a reasonable doubt, and only if they are

[1] As examples of justifiable or excusable homicides, the court mentioned a soldier in battle, a policeman in certain circumstances, and an individual acting in self-defense. App. 38.

[2] The court elaborated that an intentional homicide required the jury to find "either that the defendant intended death, or that he intended an act which was calculated and should have been understood by [a] person of reason to be one likely to do great bodily harm and that death resulted." *Id.*, at 37.

so proved is the jury to consider the distinction between murder and manslaughter.

In view of the evidence the trial court drew particular attention to the difference between murder and manslaughter. After reading the statutory definitions of both offenses,[3] the court charged that "malice aforethought is an essential and indispensable element of the crime of murder," App. 40, without which the homicide would be manslaughter. The jury was further instructed, however, that if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation.[4] The court emphasized that "malice aforethought

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[3] The Maine murder statute, Me. Rev. Stat. Ann., Tit. 17, § 2651 (1964), provides:

"Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

The manslaughter statute, Me. Rev. Stat. Ann., Tit. 17, § 2551 (1964), in relevant part provides:

"Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years . . . ."

[4] The trial court also explained the concept of express malice aforethought, which required a "premeditated design to kill" thereby manifesting a "general malignancy and disregard for human life which proceeds from a heart void of social duty and fatally bent on mischief." App. 40–42. Despite this instruction, the court repeatedly made clear that express malice need not be established since malice would be implied unless the defendant proved that he acted in the heat of passion. Hence, the instruction on express malice appears to have been wholly unnecessary, as the Maine Supreme Judicial Court subsequently held. *State* v. *Lafferty*, 309 A. 2d 647 (1973). See also n. 10, *infra*.

and heat of passion on sudden provocation are two inconsistent things," *id.*, at 62; thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter. The court then concluded its charge with elaborate definitions of "heat of passion" [5] and "sudden provocation." [6]

After retiring to consider its verdict, the jury twice returned to request further instruction. It first sought reinstruction on the doctrine of implied malice aforethought, and later on the definition of "heat of passion." Shortly after the second reinstruction, the jury found respondent guilty of murder.

Respondent appealed to the Maine Supreme Judicial Court, arguing that he had been denied due process because he was required to negate the element of malice aforethought by proving that he had acted in the heat of passion on sudden provocation. He claimed that under Maine law malice aforethought was an essential element of the crime of murder—indeed that it was the sole element distinguishing murder from manslaughter. Respondent contended, therefore, that this Court's decision in *Winship* requires the prosecution to prove the existence of that element beyond a reasonable doubt.

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[5] "Heat of passion . . . means that at the time of the act the reason is disturbed or obscured by passion to an extent which might [make] ordinary men of fair, average disposition liable to act irrationally without due deliberation or reflection, and from passion rather than judgment." App. 47.

[6] "[H]eat of passion will not avail unless upon sudden provocation. Sudden means happening without previous notice or with very brief notice; coming unexpectedly, precipitated, or unlooked for. . . . It is not every provocation, it is not every rage of passion that will reduce a killing from murder to manslaughter. The provocation must be of such a character and so close upon the act of killing, that for a moment a person could be—that for a moment the defendant could be considered as not being the master of his own understanding." *Id.*, at 47–48.

The Maine Supreme Judicial Court rejected this contention,[7] holding that in Maine murder and manslaughter are not distinct crimes but, rather, different degrees of the single generic offense of felonious homicide. *State* v. *Wilbur*, 278 A. 2d 139 (1971). The court further stated that for more than a century it repeatedly had held that the prosecution could rest on a presumption of implied malice aforethought and require the defendant to prove that he had acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. With respect to *Winship*, which was decided after respondent's trial,[8] the court noted that it did not anticipate the application of the *Winship* principle to a factor such as the heat of passion on sudden provocation.

Respondent next successfully petitioned for a writ of habeas corpus in Federal District Court. *Wilbur* v. *Robbins*, 349 F. Supp. 149 (Me. 1972). The District Court ruled that under the Maine statutes murder and manslaughter are distinct offenses, not different degrees of a single offense. The court further held that "[m]alice aforethought is made the distinguishing element of the offense of murder, and it is expressly excluded as an element of the offense of manslaughter." *Id.*, at 153. Thus, the District Court concluded, *Winship* requires the prosecution to prove malice aforethought beyond a reasonable doubt; it cannot rely on a presumption of implied malice, which requires the defendant to prove that he acted in the heat of passion on sudden provocation.

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[7] Respondent did not object to the relevant instructions at trial. The Maine Supreme Judicial Court nevertheless found the issue cognizable on appeal because it had "constitutional implications." *State* v. *Wilbur*, 278 A. 2d 139, 144 (1971).

[8] The Maine court concluded that *Winship* should not be applied retroactively. We subsequently decided, however, that *Winship* should be given complete retroactive effect. *Ivan* v. *City of New York*, 407 U. S. 203 (1972).

The Court of Appeals for the First Circuit affirmed, subscribing in general to the District Court's analysis and construction of Maine law. 473 F. 2d 943 (1973). Although recognizing that "within broad limits a state court must be the one to interpret its own laws," the court nevertheless ruled that "a totally unsupportable construction which leads to an invasion of constitutional due process is a federal matter." *Id.*, at 945. The Court of Appeals equated malice aforethought with "premeditation," *id.*, at 947, and concluded that *Winship* requires the prosecution to prove this fact beyond a reasonable doubt.

Following this decision, the Maine Supreme Judicial Court decided the case of *State* v. *Lafferty*, 309 A. 2d 647 (1973), in which it sharply disputed the First Circuit's view that it was entitled to make an independent determination of Maine law. The Maine court also reaffirmed its earlier opinion that murder and manslaughter are punishment categories of the single offense of felonious homicide. Accordingly, if the prosecution proves a felonious homicide the burden shifts to the defendant to prove that he acted in the heat of passion on sudden provocation in order to receive the lesser penalty prescribed for manslaughter.[9]

In view of the *Lafferty* decision we granted certiorari in this case and remanded to the Court of Appeals for reconsideration. 414 U. S. 1139 (1974). On

[9] The Maine court emphasized that, contrary to the view of the Court of Appeals for the First Circuit, malice aforethought connotes no substantive fact (such as premeditation), but rather is solely a policy presumption. Under its interpretation of state law, the Maine court would require proof of the same element of intent for both murder and manslaughter, the distinction being that in the latter case the intent results from a sudden provocation which leads the defendant to act in the heat of passion. 309 A. 2d, at 670–671 (concurring opinion).

remand, that court again applied *Winship*, this time to the Maine law as construed by the Maine Supreme Judicial Court. 496 F. 2d 1303 (1974). Looking to the "substance" of that law, the court found that the presence or absence of the heat of passion on sudden provocation results in significant differences in the penalties and stigma attaching to conviction. For these reasons the Court of Appeals held that the principles enunciated in *Winship* control, and that to establish murder the prosecution must prove beyond a reasonable doubt that the defendant did not act in the heat of passion on sudden provocation.

Because of the importance of the issues presented, we again granted certiorari. 419 U. S. 823 (1974). We now affirm.

II

We reject at the outset respondent's position that we follow the analysis of the District Court and the initial opinion of the First Circuit, both of which held that murder and manslaughter are distinct crimes in Maine, and that malice aforethought is a fact essential to the former and absent in the latter. Respondent argues that the Maine Supreme Judicial Court's construction of state law should not be deemed binding on this Court since it marks a radical departure from prior law,[10] leads to in-

[10] Respondent relies on *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). In that case a State Supreme Court's reinterpretation of a criminal statute was so novel as to be "unforeseeable" and therefore deprived the defendants of fair notice of the possible criminality of their acts at the time they were committed. Thus, the retroactive application of the new interpretation was itself a denial of due process. See also *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673 (1930). In this case, as respondent apparently concedes, Brief for Respondent 12, there was no comparable prejudice to respondent since in Maine the burden of proving heat of passion has rested on the defendant for more than a century. See,

ternally inconsistent results, and is a transparent effort to circumvent *Winship*. This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, see, *e. g.*, *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875); *Winters* v. *New York*, 333 U. S. 507 (1948), and that we are bound by their constructions except in extreme circumstances not present here.[11] Accordingly, we accept as binding the Maine Supreme Judicial Court's construction of state homicide law.

III

The Maine law of homicide, as it bears on this case, can be stated succinctly: Absent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—*i. e.*, by life imprisonment—unless the defendant proves

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e. g., *State* v. *Knight*, 43 Me. 11, 137–138 (1857). To be sure, the trial court instructed the jury on the concept of express malice aforethought, see n. 4, *supra*, a concept that was subsequently stripped of its vitality by the Maine Supreme Judicial Court. But the trial court explicitly stated that express malice aforethought need not be shown since malice would be implied from the unlawful homicide. In considering these instructions as a whole, see *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973), we discern no prejudice to respondent.

[11] On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an "obvious subterfuge to evade consideration of a federal issue." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 129 (1945). See *Ward* v. *Love County*, 253 U. S. 17 (1920); *Terre Haute & I. R. Co.* v. *Indiana ex rel. Ketcham*, 194 U. S. 579 (1904). In this case the Maine court's interpretation of state law, even assuming it to be novel, does not frustrate consideration of the due process issue, as the Maine court itself recognized, *State* v. *Wilbur*, 278 A. 2d, at 146, and as the remainder of this opinion makes clear. See generally Comment, Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After *Wilbur* v. *Mullaney*, 26 Me. L. Rev. 37 (1974).

by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—*i. e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years. The issue is whether the Maine rule requiring the defendant to prove that he acted in the heat of passion on sudden provocation accords with due process.

A

Our analysis may be illuminated if this issue is placed in historical context.[12] At early common law only those homicides committed in the enforcement of justice were considered justifiable; all others were deemed unlawful and were punished by death. Gradually, however, the severity of the common-law punishment for homicide abated. Between the 13th and 16th centuries the class of justifiable homicides expanded to include, for example, accidental homicides and those committed in self-defense. Concurrently, the widespread use of capital punishment was ameliorated further by extension of the ecclesiastic jurisdiction. Almost any person able to read was eligible for "benefit of clergy," a procedural device that effected a transfer from the secular to the ecclesiastic jurisdiction. And under ecclesiastic law a person who committed an unlawful homicide was not executed; instead he received a one-year sentence, had his thumb branded and was required to forfeit his goods. At the turn of the 16th century, English rulers, concerned with the accretion of ecclesiastic jurisdiction at the expense of the secular, enacted a series of statutes eliminating the benefit of

[12] Much of this history was set out in the Court's opinion in *McGautha* v. *California*, 402 U. S. 183, 197–198 (1971). See also 3 J. Stephen, A History of the Criminal Law of England 1–107 (1883); 2 F. Pollock & F. Maitland, The History of English Law 478–487 (2d ed. 1909).

clergy in all cases of "murder of malice prepensed." [13] Unlawful homicides that were committed without such malice were designated "manslaughter," and their perpetrators remained eligible for the benefit of clergy.

Even after ecclesiastic jurisdiction was eliminated for all secular offenses the distinction between murder and manslaughter persisted. It was said that "manslaughter, when voluntary,[14] arises from the sudden heat of the passions, murder from the wickedness of the heart." 4 W. Blackstone, Commentaries *190. Malice aforethought was designated as the element that distinguished the two crimes, but it was recognized that such malice could be implied by law as well as proved by evidence. Absent proof that an unlawful homicide resulted from "sudden and sufficiently violent provocation," the homicide was "presumed to be malicious." [15] *Id.*, at *201. In view of this presumption, the early English authorities, relying on the case of *The King* v. *Oneby*, 92 Eng. Rep. 465 (K. B. 1727), held that once the prosecution proved that the accused had committed the homicide, it was "incumbent upon the prisoner to make out, to the satisfaction of the court and jury" "all . . . circumstances of justification, excuse, or alleviation." 4 W. Blackstone, Commentaries

[13] 12 Hen. 7, c. 7 (1496); 4 Hen. 8, c. 2 (1512); 23 Hen. 8, c. 1, §§ 3, 4 (1531); 1 Edw. 6, c. 12, § 10 (1547).

[14] Blackstone also referred to a class of homicides called involuntary manslaughter. Such homicides were committed by accident in the course of perpetrating another unlawful, although not felonious, act. 4 W. Blackstone, Commentaries *192–193. This offense, with some modification and elaboration, generally has been recognized in this country. See R. Perkins, Criminal Law 70–77 (2d ed. 1969).

[15] Thus it appears that the concept of express malice aforethought was surplusage since if the homicide resulted from sudden provocation it was manslaughter; otherwise it was murder. In this respect, Maine law appears to follow the old common law. See generally Comment, The Constitutionality of the Common Law Presumption of Malice in Maine, 54 B. U. L. Rev. 973, 986–999 (1974).

*201. See M. Foster, Crown Law 255 (1762). Thus, at common law the burden of proving heat of passion on sudden provocation appears to have rested on the defendant.[16]

In this country the concept of malice aforethought took on two distinct meanings: in some jurisdictions it came to signify a substantive element of intent, requiring the prosecution to prove that the defendant intended to kill or to inflict great bodily harm; in other jurisdictions it remained a policy presumption, indicating only that absent proof to the contrary a homicide was presumed not to have occurred in the heat of passion. See *State* v. *Rollins*, 295 A. 2d 914, 918–919 (Me. 1972). See generally Perkins, A Re-Examination of Malice Aforethought, 43 Yale L. J. 537, 548–549, 566–568 (1934).[17] In a landmark case, *Commonwealth* v. *York*, 50 Mass. 93 (1845), Chief Justice Shaw of the Massachusetts Supreme Judicial Court held that the defendant was required to negate malice aforethought by proving by a pre-

[16] Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L. J. 880, 904–907 (1968), disputes this conclusion, arguing that the reliance on *Oneby*'s case was misplaced. In *Oneby* the jury returned a special verdict making specific findings of fact. No finding was made with respect to provocation. Absent such a finding the court held that the homicide was murder. Fletcher maintains that in the context of a special verdict it is impossible to determine whether the defendant failed to satisfy his burden of going forward with "some evidence" or the ultimate burden of persuading the jury. See also n. 20, *infra*.

[17] Several jurisdictions also divided murder into different degrees, typically limiting capital punishment to first-degree murder and requiring the prosecution to prove premeditation and deliberation in order to establish that offense. See Keedy, History of the Pennsylvania Statute Creating Degrees of Murder, 97 U. Pa. L. Rev. 759 (1949); Wechsler & Michael, A Rationale of the Law of Homicide: I, 37 Col. L. Rev. 701, 703–707 (1937).

ponderance of the evidence that he acted in the heat of passion.[18] Initially, *York* was adopted in Maine [19] as well as in several other jurisdictions.[20] In 1895, however, in

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[18] Justice Wilde dissented, arguing that the Commonwealth was required to prove all facts necessary to establish murder, including malice aforethought, which in turn required it to negate the suggestion that the killing occurred in the heat of passion on sudden provocation. He also rejected the doctrine of implied malice on the ground that "[n]o malice can be inferred from the mere act of killing. Such a presumption, therefore, is arbitrary and unfounded." 50 Mass., at 128.

[19] *State* v. *Knight*, 43 Me. 11 (1857).

[20] See cases cited in Fletcher, *supra*, n. 16, at 903 nn. 77–79. Some confusion developed, however, as to precisely what *York* required. Contemporary writers divide the general notion of "burden of proof" into a burden of *producing* some probative evidence on a particular issue and a burden of *persuading* the factfinder with respect to that issue by a standard such as proof beyond a reasonable doubt or by a fair preponderance of the evidence. See, *e. g.*, E. Cleary, McCormick on Evidence § 336 (2d ed. 1972). This distinction apparently was not well recognized at the time *York* was decided, and thus in some jurisdictions it was unclear whether the defendant was required to bear the production burden or the persuasion burden on the issue of heat of passion. See, *e. g.*, cases discussed in *People* v. *Morrin*, 31 Mich. App. 301, 315–323, 187 N. W. 2d 434, 441–446 (1971). Indeed, 10 years after the decision in *York*, Chief Justice Shaw explained that "the doctrine of *York's case* was that where the killing is proved to have been committed by the defendant, and *nothing further is shown*, the presumption of law is that it was malicious and an act of murder." *Commonwealth* v. *Hawkins*, 69 Mass. 463, 465 (1855) (emphasis in original). He further noted that this presumption did not govern when there was evidence indicating that the defendant might have acted in the heat of passion. In that situation, "if the jury, upon all the circumstances, are satisfied, beyond a reasonable doubt, that [the homicide] was done with malice, they will return a verdict of murder; otherwise, they will find the defendant guilty of manslaughter." *Id.*, at 466. Thus, even the author of *York* quickly limited its scope to require only that the accused produce some evidence on the issue of passion; that is, that he satisfy the production but not the persuasion burden. Other

the context of deciding a question of federal criminal procedure, this Court explicitly considered and unanimously rejected the general approach articulated in *York*. *Davis* v. *United States*, 160 U. S. 469.[21] And, in the past half century, the large majority of States have abandoned *York* and now require the prosecution to prove the absence of the heat of passion on sudden provocation beyond a reasonable doubt. See W. LaFave & A. Scott, Handbook on Criminal Law 539–540 (1972).[22]

This historical review establishes two important points. First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor in determining the degree of culpability attaching to an unlawful homicide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact. See generally Fletcher, *supra*, n. 16; H. Packer, The Limits of the Criminal Sanction 137–139 (1968).

B

Petitioners, the warden of the Maine Prison and the State of Maine, argue that despite these considerations

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jurisdictions blurred the distinction between these two burdens by requiring the defendant to prove "to the satisfaction of the jury" that he acted in the heat of passion. See, *e. g.*, *State* v. *Willis*, 63 N. C. 26 (1868).

[21] In *Leland* v. *Oregon*, 343 U. S. 790 (1952), the Court declined to apply the specific holding of *Davis*—that the prosecution must prove sanity beyond a reasonable doubt—to the States.

[22] See also *State* v. *Cuevas*, 488 P. 2d 322 (Haw. 1971) (*Winship* requires the prosecution to prove malice aforethought beyond a reasonable doubt). England also now requires the prosecution to negate heat of passion on sudden provocation by proof beyond a reasonable doubt. *Mancini* v. *Director of Public Prosecutions*, [1942] A. C. 1; see *Woolmington* v. *Director of Public Prosecutions*, [1935] A. C. 462.

Winship should not be extended to the present case. They note that as a formal matter the absence of the heat of passion on sudden provocation is not a "fact necessary to constitute the *crime*" of felonious homicide in Maine. *In re Winship*, 397 U. S., at 364 (emphasis supplied). This distinction is relevant, according to petitioners, because in *Winship* the facts at issue were essential to establish criminality in the first instance, whereas the fact in question here does not come into play until the jury already has determined that the defendant is guilty and may be punished at least for manslaughter. In this situation, petitioners maintain, the defendant's critical interests in liberty and reputation are no longer of paramount concern since, irrespective of the presence or absence of the heat of passion on sudden provocation, he is likely to lose his liberty and certain to be stigmatized.[23] In short, petitioners would limit *Winship* to those facts which, if not proved, would wholly exonerate the defendant

This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also

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[23] Relying on *Williams* v. *New York*, 337 U. S. 241 (1949), and *McGautha* v. *California*, 402 U. S., at 196, petitioners seek to buttress this contention by arguing that since the presence or absence of the heat of passion on sudden provocation affects only the extent of punishment it should be considered a matter within the traditional discretion of the sentencing body and therefore not subject to rigorous due process demands. But cf. *United States* v. *Tucker*, 404 U. S. 443 (1972). There is no incompatibility between our decision today and the traditional discretion afforded sentencing bodies. Under Maine law the jury is given no discretion as to the sentence to be imposed on one found guilty of felonious homicide. If the defendant is found to be a murderer, a mandatory life sentence results. On the other hand, if the jury finds him guilty only of manslaughter it remains for the trial court in the exercise of *its* discretion to impose a sentence within the *statutorily defined* limits.

with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]," *State* v. *Lafferty*, 309 A. 2d, at 671, 673 (concurring opinion), they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes.

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offense of felonious homicide into three distinct punishment categories—murder, voluntary manslaughter, and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be

intentional or the result of criminally reckless conduct. See *State* v. *Lafferty, supra,* at 670–672 (concurring opinion). But under Maine law these facts of intent are not general elements of the crime of felonious homicide. See Brief for Petitioners 10 n. 5. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide—even one that traditionally might be considered involuntary manslaughter—unless the *defendant* was able to prove that his act was neither intentional nor criminally reckless.[24]

Winship is concerned with substance rather than this kind of formalism.[25] The rationale of that case requires an analysis that looks to the "operation and effect of the law as applied and enforced by the State," *St. Louis S. W. R. Co.* v. *Arkansas,* 235 U. S. 350, 362 (1914), and to the interests of both the State and the defendant as affected by the allocation of the burden of proof.

In *Winship* the Court emphasized the societal interests in the reliability of jury verdicts: [26]

> "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal

[24] Many States impose different statutory sentences on different degrees of assault. If *Winship* were limited to a State's definition of the elements of a crime, these States could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation—*e. g.,* intent to kill or intent to rob. But see *State* v. *Ferris,* 249 A. 2d 523 (Me. 1969) (prosecution must prove elements of aggravation in criminal assault case by proof beyond a reasonable doubt).

[25] Indeed, in *Winship* itself the Court invalidated the burden of proof in a juvenile delinquency proceeding even though delinquency was not formally considered a "crime" under state law. 397 U. S., at 365–366; *id.,* at 373–374 (Harlan, J., concurring).

[26] See also *Lego* v. *Twomey,* 404 U. S. 477, 486 (1972).

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> prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .
>
> "Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U. S., at 363, 364.

These interests are implicated to a greater degree in this case than they were in *Winship* itself. Petitioner there faced an 18-month sentence, with a maximum possible extension of an additional four and one-half years, *id.*, at 360, whereas respondent here faces a differential in sentencing ranging from a nominal fine to a mandatory life sentence. Both the stigma to the defendant and the community's confidence in the administration of the criminal law are also of greater consequence in this case,[27] since the adjudication of delinquency involved in *Winship* was "benevolent" in intention, seeking to provide "a generously conceived program of compassionate treatment." *Id.*, at 376 (BURGER, C. J., dissenting).

Not only are the interests underlying *Winship* implicated to a greater degree in this case, but in one respect the protection afforded those interests is less here. In *Winship* the ultimate burden of persuasion remained with the prosecution, although the standard had been reduced to proof by a fair preponderance of the evidence.

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[27] See *Duncan* v. *Louisiana*, 391 U. S. 145, 160 (1968):

"The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments.'" Quoting from *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937).

In this case, by contrast, the State has affirmatively shifted the burden of proof to the defendant. The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction. Such a result directly contravenes the principle articulated in *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958):

> "[W]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial . . . ."

See also *In re Winship*, 397 U. S., at 370–372 (Harlan, J., concurring).

C

It has been suggested, *State* v. *Wilbur*, 278 A. 2d, at 145, that because of the difficulties in negating an argument that the homicide was committed in the heat of passion the burden of proving this fact should rest on the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential.

Indeed, the Maine Supreme Judicial Court itself acknowledged that most States require the prosecution to prove the absence of passion beyond a reasonable doubt. *Id.*, at 146.[28] Moreover, the difficulty of meeting such an

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[28] See *supra*, at 696. See also 38 Mo. L. Rev. 105 (1973). Many States do require the defendant to show that there is "some evidence" indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of

exacting burden is mitigated in Maine where the fact at issue is largely an "objective, rather than a subjective, behavioral criterion." *State* v. *Rollins*, 295 A. 2d, at 920. In this respect, proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent; it may be established by adducing evidence of the factual circumstances surrounding the commission of the homicide. And although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him. See *Tot* v. *United States*, 319 U. S. 463, 469 (1943); *Leary* v. *United States*, 395 U. S. 6, 45 (1969).

Nor is the requirement of proving a negative unique in our system of criminal jurisprudence.[29] Maine itself requires the prosecution to prove the absence of self-defense beyond a reasonable doubt. See *State* v. *Millett*, 273 A. 2d 504 (1971).[30] Satisfying this burden imposes an obligation that, in all practical effect, is identical to the burden involved in negating the heat of passion on sudden provocation. Thus, we discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability.[31]

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passion beyond a reasonable doubt. See W. LaFave & A. Scott, Criminal Law 539 (1972); Perkins, *supra*, n. 14, at 50–51. See also nn. 16 & 20, *supra*. Nothing in this opinion is intended to affect that requirement. See also n. 30, *infra*.

[29] See generally F. Wharton, A Treatise on the Law of Evidence § 320 (9th ed. 1884); Model Penal Code § 1.13, Comment, p. 110 (Tent. Draft No. 4, 1955); Fletcher, *supra*, n. 16, at 883, and n. 14.

[30] In *Millett* the Maine Supreme Judicial Court adopted the "majority rule" regarding proof of self-defense. The burden of producing "some evidence" on this issue rests with the defendant, but the ultimate burden of persuasion by proof beyond a reasonable doubt remains on the prosecution.

[31] This conclusion is supported by consideration of a related line of

IV

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser

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cases. Generally in a criminal case the prosecution bears both the production burden and the persuasion burden. In some instances, however, it is aided by a presumption, see *Davis* v. *United States*, 160 U. S. 469 (1895) (presumption of sanity), or a permissible inference, see *United States* v. *Gainey*, 380 U. S. 63 (1965) (inference of knowledge from presence at an illegal still). These procedural devices require (in the case of a presumption) or permit (in the case of an inference) the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having satisfactorily established other facts. Thus, in effect they require the defendant to present some evidence contesting the otherwise presumed or inferred fact. See *Barnes* v. *United States*, 412 U. S. 837, 846 n. 11 (1973). Since they shift the production burden to the defendant, these devices must satisfy certain due process requirements. See *e. g.*, *Barnes* v. *United States*, *supra*; *Turner* v. *United States*, 396 U. S. 398 (1970).

In each of these cases, however, the ultimate burden of persuasion by proof beyond a reasonable doubt remained on the prosecution. See, *e. g.*, *Barnes* v. *United States*, *supra*, at 845 n. 9; *Davis* v. *United States*, *supra*, at 484–488. Shifting the burden of persuasion to the defendant obviously places an even greater strain upon him since he no longer need only present some evidence with respect to the fact at issue; he must affirmatively establish that fact. Accordingly, the Due Process Clause demands more exacting standards before the State may require a defendant to bear this ultimate burden of persuasion. See generally Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L. J. 165 (1969).

crime of manslaughter. *In re Winship*, 397 U. S., at 372 (concurring opinion). We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. Accordingly, the judgment below is

Affirmed.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, concurring.

While I join in the Court's opinion, the somewhat peculiar posture of the case as it comes to us leads me to add these observations.

Respondent made no objection to the trial court's instruction respecting the burden of proof on the issue of whether he had acted in the heat of passion on sudden provocation. Nonetheless, on his appeal to the Supreme Judicial Court of Maine, that court considered his objection to the charge on its merits and held the charge to be a correct statement of Maine law. It neither made any point of respondent's failure to object to the instruction in the trial court,* nor did it give any consideration to the doctrine long approved by this Court that the

*While *Fay* v. *Noia*, 372 U. S. 391 (1963), holds that a failure to appeal through the state-court system from a constitutionally infirm judgment of conviction does not bar subsequent relief in federal habeas corpus, failure to object to a proposed instruction should stand on a different footing. It is one thing to fail to utilize the appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forgo making an objection or exception which might prevent the error from ever occurring. Cf. *Davis* v. *United States*, 411 U. S. 233 (1973). Here, however, the Maine Supreme Judicial Court nevertheless affirmatively ruled that the issue was cognizable despite respondent's failure to object at trial. See majority opinion, *ante*, at 688 n. 7. And the State did not contest the propriety of consideration of the issue in federal habeas.

instructions to the jury are not to be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States,* 271 U. S. 104, 107 (1926); *Cupp* v. *Naughten,* 414 U. S. 141, 147 (1973). It likewise expressed no view on whether, even though the instruction might have amounted to constitutional error, that error could have been harmless. *Chapman* v. *California,* 386 U. S. 18 (1967). Its reason for not treating the possibility that the error was harmless may have been because, as this Court's opinion points out, *ante,* at 687, the jury came back in the midst of its deliberations and requested further instructions on the doctrine of implied malice aforethought and the definition of "heat of passion."

The case which has now reached us through the route of federal habeas corpus, therefore, is a highly unusual one which does present the abstract question of law isolated by the Supreme Judicial Court of Maine and now decided here.

I agree with the Court that *In re Winship,* 397 U. S. 358 (1970), does require that the prosecution prove beyond a reasonable doubt every element which constitutes the crime charged against a defendant. I see no inconsistency between that holding and the holding of *Leland* v. *Oregon,* 343 U. S. 790 (1952). In the latter case this Court held that there was no constitutional requirement that the State shoulder the burden of proving the sanity of the defendant.

The Court noted in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea,* if any, required by state law, had been proved beyond a reasonable doubt. *Id.,* at 792, 795. Although as the state court's instructions in *Leland* recognized, *id.,* at 794–795, evidence relevant

to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof of insanity on Leland, unlike Maine's redefinition of homicide in the instant case, did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense. *Id.*, at 795. Both the Court's opinion and the concurring opinion of Mr. Justice Harlan in *In re Winship, supra,* stress the importance of proof beyond a reasonable doubt in a criminal case as "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." 397 U. S., at 372 (Harlan, J., concurring). Having once met that rigorous burden of proof that, for example, in a case such as this, the defendant not only killed a fellow human being, but did it with malice aforethought, the State could quite consistently with such a constitutional principle conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue.

Syllabus

PHILBROOK, COMMISSIONER, DEPARTMENT OF SOCIAL WELFARE *v.* GLODGETT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

No. 73–1820. Argued March 24–25, 1975—Decided June 9, 1975*

Under the Aid to Families with Dependent Children (AFDC) program of the Social Security Act (Act), the term "dependent child" was expanded to include children whose deprivation was caused by a parent's unemployment. Section 407 (b) (2) (C) (ii) of the Act, as amended in 1968, makes this expanded definition applicable only if a state plan under the AFDC program denies aid to a dependent child so defined "with respect to any week for which such child's father receives unemployment compensation." Vermont, to qualify for federal funding under this unemployed-father program, promulgated a regulation under its participating Aid to Needy Families with Children (ANFC) program, defining an "unemployed father" as one who is, *inter alia*, out of work, provided "[h]e is not receiving Unemployment Compensation during the same *week* as assistance is granted." Appellees, who are parents and children of Vermont families whose ANFC assistance was terminated or denied because the fathers were receiving unemployment compensation, filed suit against appellant Commissioner of the Vermont Department of Social Welfare and appellant Secretary of Health, Education, and Welfare to enjoin enforcement of the federal statute and state regulation. Holding that it had jurisdiction over the parties under 28 U. S. C. § 1343 (3), and construing § 407 (b) (2) (C) (ii) as making actual payment of, rather than mere eligibility for, unemployment compensation the disqualifying factor for AFDC benefits, a three-judge District Court held that the Vermont regulation could not be applied so as to conflict with this construction of the federal statute, and entered an injunction to this effect. *Held:*

1. The Vermont regulation, as applied to exclude unemployed fathers who are merely eligible for unemployment compensation

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*Together with No. 74–132, *Weinberger, Secretary of Health, Education, and Welfare* v. *Glodgett et al.*, also on appeal from the same court.

from receiving ANFC benefits, impermissibly conflicts with § 407 (b)(2)(C)(ii), as correctly interpreted by the District Court. As evidenced by that provision's legislative history, Congress did not intend the provision's coverage to be at the State's discretion once it elected to participate. Pp. 713–719.

2. This Court will not inquire into the question whether the District Court had jurisdiction over appellant Secretary but will make an exception to the general rule that this Court has a duty to so inquire, where the question has been inadequately briefed, the substantive issue has been decided in the State's case, and the Secretary has stated he will comply with the District Court decision on the statutory issue if it is affirmed. The exercise of the District Court's jurisdiction over the Secretary has resulted in no adjudication on the merits that could not have been just as properly made without the Secretary, and in no issuance of process against the Secretary that he has properly contended to be wrongful before this Court. Pp. 720–722.

368 F. Supp. 211, No. 73–1820, affirmed; No. 74–132, dismissed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

William L. Patton argued the cause for appellant in No. 74–132. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Hills, Acting Assistant Attorney General Jaffe, Leonard Schaitman, Anthony J. Steinmeyer,* and *John B. Rhinelander. David L. Kalib,* Assistant Attorney General of Vermont, argued the cause for appellant in No. 73–1820. With him on the brief were *Kimberly B. Cheney,* Attorney General, and *Dean B. Pineles,* Assistant Attorney General.

Richard S. Kohn argued the cause and filed a brief for appellees in both cases.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In these consolidated appeals we are called upon to construe a provision of the Social Security Act of 1935 (Act), as amended, and to ascertain whether a Vermont welfare

regulation impermissibly conflicts with that provision. A three-judge District Court held that it did, 368 F. Supp. 211 (Vt. 1973), and we noted probable jurisdiction in the appeal of appellant Philbrook, Commissioner of the Vermont Department of Social Welfare, in No. 73–1820, and postponed consideration of the question of jurisdiction in the appeal of appellant Weinberger, Secretary of Health, Education, and Welfare, in No. 74–132. 419 U. S. 963 (1974). Philbrook's appeal presents only the question of whether the Vermont welfare regulation in question conflicts with § 407 (b)(2)(C)(ii) of the Act, as amended, 42 U. S. C. § 607 (b)(2)(C)(ii), while the Secretary's appeal presents the additional issue of whether the District Court correctly concluded that it had jurisdiction over the Secretary under the doctrine of pendent jurisdiction.

I

In Title IV of the Act, 49 Stat. 627, Congress enacted the Aid to Dependent Children program,[1] through which federal funds would be granted to qualifying States in order to provide aid to dependent children. The term "dependent child" was originally defined to include only children whose deprivation was caused by "the death, continued absence from the home, or physical or mental incapacity of a parent," [2] but in 1961 Congress expanded the definition of dependent

[1] The name of the program was changed in 1962 to "Aid and Services to Needy Families with Children," and the name of the assistance provided thereunder became "Aid to Families with Dependent Children" (AFDC). Pub. L. 87–543, 76 Stat. 185. Vermont has elected to call its participating program Aid to Needy Families with Children (ANFC).

[2] § 406 (a) of the Act, 49 Stat. 629. See generally *Burns* v. *Alcala*, 420 U. S. 575 (1975).

child to include children whose deprivation was caused by the unemployment of a parent.[3] This program was enacted on an experimental basis[4] and gave States the authority to define "unemployment" and to deny AFDC benefits in whole or in part if the unemployed parent received unemployment compensation during the relevant period. In 1968 Congress elected to make the unemployed-parent program permanent,[5] but in response to problems that had arisen during the trial period, Congress retracted some of the authority that had formerly been delegated to the States.[6] Under these and other

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[3] 75 Stat. 75. See 1961 Public Papers of the Presidents of the United States (John F. Kennedy) 46–47; H. R. Rep. No. 28, 87th Cong., 1st Sess. (1961); S. Rep. No. 165, 87th Cong., 1st Sess. (1961); H. R Conf. Rep. No. 307, 87th Cong., 1st Sess. (1961).

[4] The 1961 legislation was scheduled to expire on June 30, 1962, but it was extended for a five-year period in 1962, 76 Stat. 193, and for one more year in 1967, 81 Stat. 94.

[5] 81 Stat. 882; H. R. Rep. No. 544, 90th Cong., 1st Sess., 17, 107–109, 175–176 (1967); S. Rep. No. 744, 90th Cong., 1st Sess. (1967); H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. (1967).

[6] Under the 1961 legislation, the States had adopted such varying definitions of "unemployment" that uniform administration of the program became impossible; in some instances the States had adopted such a broad definition as to have "gone beyond anything that the Congress originally envisioned." H. R. Rep. No. 544, *supra*, at 108. See Statement of Wilbur J. Cohen, Undersecretary of the Department of Health, Education, and Welfare, Hearings on H. R. 12080, before the Senate Committee on Finance, 90th Cong., 1st Sess., 268–269 (1967). Congress responded by enacting a federal definition of "unemployment" which required States to include fathers who had "a substantial connection with the work force," H. R. Rep. No. 544, *supra*, at 17, and exclude families if the unemployed father "receives unemployment compensation under an unemployment compensation law of a State or of the United States." 81 Stat. 883. The Senate had preferred to retain the option giving the States the discretion to deny AFDC benefits to families receiving unemployment compensation, S. Rep. No. 744,

changes that also became effective in 1968,[7] the expanded definition of "dependent child," § 407 (a) of the Act, applies only if participating States deny aid

> "to families with dependent children to any child or relative specified in subsection (a) of this section—
>
> . . . . .
>
> "(ii) with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States." § 407 (b)(2)(C)(ii) of the Act, 42 U. S. C. § 607 (b)(2)(C)(ii).

To qualify for funding under this unemployed-father program, Vermont promulgated Welfare Regulation 2333.1, which provides in relevant part:

> "An 'unemployed father' is one whose minor children are in need because he is out of work, is work-

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supra, at 28, but receded at conference, H. R. Conf. Rep. No. 1030, *supra*, at 57.

Congress also expressed its displeasure with the state practice which had made "families in which the father is working but the mother is unemployed eligible," H. R. Rep. No. 544, *supra*, at 108, and restricted the program to children of unemployed *fathers*.

[7] In the next session the Senate tried again to modify the mandatory exclusion of § 407 (b). See n. 6, *supra*. Under the major modifications made at the beginning of 1968, a family that received unemployment compensation for any part of a month was automatically disqualified from AFDC assistance for the entire month. The Senate sought to restore to the States the option to permit or deny AFDC assistance to families in this situation, S. Rep. No. 1014, 90th Cong., 2d Sess., 9 (1968). A compromise was reached in Conference by which the mandatory exclusion was retained in concept but relaxed in application: a father receiving unemployment compensation during any month would be denied AFDC assistance but only with respect to the weeks for which unemployment compensation was received. 82 Stat. 273. See H. R. Conf. Rep. No. 1533, 90th Cong., 2d Sess., 49 (1968).

ing part-time, or is not at work due to an industrial dispute (strike), for at least 30 days prior to receiving assistance, provided that:

. . . . .

"(3) He is not receiving Unemployment Compensation during the same *week* as assistance is granted."

Appellees are the parents and minor children of Vermont families whose ANFC assistance was terminated or whose applications for assistance were rejected because the fathers were receiving unemployment compensation; in each instance the amount of money received by the family in unemployment compensation was less than would have been received under the ANFC program. Appellees filed suit against Commissioner Philbrook and Secretary Weinberger to enjoin the enforcement of the federal statute and state regulation. The three-judge court, finding that it had jurisdiction over the parties by virtue of 28 U. S. C. § 1343 (3), concluded "from the language of the statute that the disqualifying factor is actual payment, rather than mere eligibility for unemployment compensation." 368 F. Supp., at 217. Under this construction of § 407 (b)(2)(C)(ii) of the Act, 42 U. S. C. § 607 (b)(2)(C)(ii), a father who otherwise qualified had an option to receive either an unemployment compensation check or ANFC assistance, whichever was greater, and the Vermont regulation could not be applied so as to conflict with this construction of the federal statute. An injunction to this effect was entered, and both the state and federal parties have appealed.[8]

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[8] At oral argument a question arose regarding the jurisdiction of this Court over the appeals, 28 U. S. C. § 1253, and the parties have filed supplemental briefs on this point. On authority of *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90 (1974), and *MTM, Inc.* v. *Baxley*, 420 U. S. 799 (1975), appellant Weinberger contends that any appeal from the District Court's judgment should

II

The appellants do not contest, as indeed they could not, that § 407 (b)(2)(C)(ii) speaks in terms of a "father [who] *receives* unemployment compensation" rather than a "father [who] is *eligible* to receive unemployment compensation." They do contend, however, that the District Court's construction of that section is wholly at odds with the premise underlying the AFDC program and with the approach to non-AFDC resources dictated by § 402 (a)(7) of the Act, 42 U. S. C. § 602 (a)(7). "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122 (1849); *Richards* v. *United States*, 369 U. S. 1, 11 (1962); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395, 402–403 (1975). Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will. The language of § 407 (b)(2)(C)(ii) certainly leans toward the construction adopted by the

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have been taken to the Court of Appeals; appellant Philbrook and appellees contend that the appeals are properly before this Court.

In *Hagans* v. *Lavine*, 415 U. S. 528 (1974), this Court indicated that it was the preferred practice for a single judge, when presented with both statutory and constitutional grounds for decision, to resolve the statutory claim before convening a three-judge court. The District Court in this case was unable to proceed in that manner because appellees raised only constitutional contentions in their complaint, App. 10, and raised their statutory contention, for the first time, at oral argument before the three-judge court. Tr. of Oral Arg. before the United States District Court for the District of Vermont 42–44 (Mar. 5, 1973). Appellant Weinberger urges us to reconsider our decision in *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423 (1966), in which we held that, if a three-judge court is convened and decides a case on statutory grounds, the judgment may be appealed to this Court under 28 U. S. C. § 1253, but we decline to do so.

District Court, but "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892).

In order to qualify for federal assistance under the AFDC program, a state plan must "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children." § 402 (a)(7) of the Act, 42 U. S. C. § 602 (a)(7). Further force to this statutory command has been applied by regulations requiring state agencies to "carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability." 45 CFR § 233.20 (a)(3)(ix) (1974). It flies in the face of this statutory scheme, argue appellants, to construe a provision of the same Title so as to permit a person to decline resources, for which he is eligible, in order to qualify for AFDC assistance. See *Shea* v. *Vialpando*, 416 U. S. 251 (1974). This anomaly is compounded by the violence done to the intended operation of unemployment compensation programs by the District Court's construction. Unemployment compensation programs, financed by employer contributions, are intended to operate without regard to need and be available to a recipient as a matter of right. See *California Dept. of Human Resources Development* v. *Java*, 402 U. S. 121 (1971). The appellants contend that AFDC should not be available when unemployment compensation, "the first line of defense," can be obtained.[9]

[9] Appellant Philbrook also argues that the District Court's construction operates "to shift drastically the burden of supporting families of unemployed fathers from the unemployment compensation program to the AFDC program." Brief for Appellant Philbrook 27. Such a shift from private-sector to public-sector

An argument based on intersectional harmony might have considerable force in other circumstances, but we find it unpersuasive as applied to appellants' case. Under § 402 (a)(7), an applicant's other income and resources are taken into account in determining the applicant's need. If the amount "is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference." *Shea* v. *Vialpando, supra,* at 254. If § 407 (b)(2) had been intended to fit smoothly into the AFDC program, then assistance payments should be *reduced* by the amount of unemployment compensation received by a father; this much the federal appellant concedes.[10] But Congress has expressly provided otherwise: receipt of unemployment compensation results in *termination* of AFDC benefits. The appellants are simply incorrect when they characterize their construction of § 407 (b)(2)(C)(ii) as consistent with the overall pattern of the AFDC program while assailing the District Court's interpretation as fundamentally disruptive; the fact of the matter is that neither construction is harmonious with the program's general approach to income and resources.

Appellants contend that the legislative history of the Social Security Amendments of 1968 supports their position that "an unemployed father would be required to exhaust the unemployment compensation resource" before becoming entitled to receive AFDC assistance.[11]

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financing distorts the intended relationship between the unemployment compensation and AFDC programs, and gives private employers a windfall gain since their financial obligation under the unemployment compensation program is a function of amounts paid out in claims. *Ibid.*

[10] Brief for Appellant Weinberger 19 n. 6.

[11] *Id.*, at 21. Appellant Secretary concedes that Congress did not intend AFDC assistance to be terminated immediately upon a

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They rely upon a statement in the Conference Report as proof that when Congress used the term "receives" in § 407 (b)(2)(C)(ii) it intended to include within that term persons who were eligible to receive unemployment compensation:

> "Section 407 of the Social Security Act, as amended by section 203 (a) of the House bill, defined an unemployed father (for purposes of determining the eligibility of his children for AFDC) so as to exclude fathers who do not have 6 or more quarters of work in any 13-calendar-quarter period ending within one year prior to the application for aid, and fathers who receive (*or are qualified to receive*) any unemployment compensation under State law.
>
> "The Senate amendments removed these exclusions, and restored the provision of present law under which a State may at its option wholly or partly deny AFDC for any month where the father receives unemployment compensation during the month. . . .
>
> "The Senate recedes . . . ." H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 57 (1967) (emphasis added).

We have carefully reviewed the context of that statement in view of the positions of the House and Senate on § 407, and we agree with appellees that the above-

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father's eligibility for unemployment compensation. Congress recognized that there was a delay between application for unemployment compensation and receipt of the first check. During this period, even under the Secretary's construction, AFDC assistance is available. The Secretary's position is that a person who is eligible for unemployment compensation must take the steps necessary to receive such payments and, upon receipt, AFDC terminates. A father may not, in the Secretary's opinion, decline unemployment compensation or refuse to apply for such compensation when he is eligible. *Id.*, at 16–17, n. 4.

quoted language is ambiguous at best. It seems more likely that the Conference Committee was referring to § 407 (b)(1)(C) of the Act[12] than to § 407 (b)(2)(C)(ii). Although both Houses of Congress agreed in 1968 that a federal definition of unemployment was necessary, they disagreed about the considerations that should be embodied in that definition. The House sought to limit participation under the unemployed-father provision to fathers who had "a substantial connection with the work force." H. R. Rep. No. 544, 90th Cong., 1st Sess., 17 (1967).

> "[I]t is the intent of your committee to exclude from the program those fathers who have not been in the labor force, or whose attachment to the labor force has been casual." *Id.*, at 108.

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[12] Section 407 (b)(1) of the Act, 42 U. S. C. § 607 (b)(1), provides:

"(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title

"(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) in this section when—

"(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

"(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

"(C)(i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation under the unemployment compensation law of the State, within one year prior to the application for such aid."

Although the Senate and the Administration did not favor requiring a substantial connection with the work force as a condition for inclusion under the unemployed-father program,[13] the House version prevailed at Conference. In implementing the House standard, Congress demonstrated an awareness of the difference between receipt of unemployment benefits and eligibility for such benefits. In defining the requisite prior attachment to the employment market, Congress included fathers who had

> "6 or more quarters of work . . . in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) . . . received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of subsection (d)(3) of this section) for unemployment compensation . . . , within one year prior to the application for such aid." § 407 (b)(1)(C) of the Act, 42 U. S. C. § 607 (b)(1)(C).[14]

That Congress was not quite as discriminating in § 407 (b)(2)(C)(ii) conveys a good deal about its intent. It

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[13] S. Rep. No. 744, *supra*, n. 5, at 28; Statement of Undersecretary Cohen, *supra*, n. 6, at 269.

[14] Section 407 (d)(3) of the Act, 42 U. S. C. § 607 (d)(3), provides:

"(d) For purposes of this section—

. . . . . .

"(3) an individual shall be deemed qualified for unemployment compensation under the State's unemployment compensation law if—

"(A) he would have been eligible to receive such unemployment compensation upon filing application, or

"(B) he performed work not covered under such law and such work, if it had been covered, would (together with any covered work he performed) have made him eligible to receive such unemployment compensation upon filing application."

seems to us that the section from the Conference Report relied upon by appellants probably was directed to § 407 (b)(1)(C)(ii) rather than to the section at issue in these appeals.

The District Court correctly concluded "that a family eligible for ANFC benefits under [42 U. S. C. §] 607 can be excluded only for each week in which unemployment compensation is actually received by the father." 368 F. Supp., at 217. If, as appellants contend, § 407 (b)(2)(C)(ii) is inconsistent with the general scheme of the AFDC program or works to shift costs from the private to the public sector in contravention of prudent resource management, it is the legislative branch to which appeals for modification must be directed.

With the federal standard of eligibility thus understood, it is apparent that the Vermont definition of "unemployed father," which has been applied to exclude unemployed fathers who are eligible for unemployment compensation, conflicts with § 407 (b)(2)(C)(ii). Vermont "may not deny aid to persons who come within it in the absence of a clear indication that Congress meant the coverage to be optional." *Burns* v. *Alcala,* 420 U. S. 575, 580 (1975); *King* v. *Smith,* 392 U. S. 309 (1968); *Townsend* v. *Swank,* 404 U. S. 282 (1971); *Carleson* v. *Remillard,* 406 U. S. 598 (1972). See also *New York Dept. of Social Services* v. *Dublino,* 413 U. S. 405, 421–422 (1973). An important purpose of the 1968 amendments was to eliminate the variations in state definitions of unemployment, see n. 6, *supra,* and the Congress twice turned back attempts by the Senate to restore to States discretion in the coverage of the program. In these circumstances we find that Congress did not intend the coverage of § 407 to be optional once a State elected to participate. That portion of the judgment appealed from in No. 73–1820 is affirmed.

III

The District Court held that 28 U. S. C. § 1343 (3) afforded jurisdiction over the Secretary under principles of pendent jurisdiction. We have previously characterized this question as "subtle and complex . . . with far-reaching implications." *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973). See also *Christian* v. *New York Dept. of Labor*, 414 U. S. 614, 617 n. 3 (1974). This issue is the first of the "Questions Presented" in the Secretary's brief on the merits, but while the section of that brief devoted to argument does characterize the issue as "difficult and complex," it concludes that we need not decide the question. The Secretary reasons that if we rule in his favor on the merits of the statutory question, which he presents as the second question presented by this appeal and which is identical to the question presented by appellant Philbrook, the case should be remanded so that the District Court may decide appellees' constitutional challenges to the statute as herein construed; in that event the Secretary advises that "the government intends to end the jurisdictional controversy by filing a motion to intervene." Brief for Appellant Weinberger 13. On the other hand, the Secretary tells us that if we agree with the District Court and disagree with him on the merits of the statutory question, as to which jurisdiction over the state defendant was properly invoked, "the jurisdictional question with respect to the Secretary would become inconsequential since the Secretary as well as the State would, of course, administer the statute in accordance with this Court's interpretation." *Ibid.*

We do not believe that the Secretary's treatment of his role in this appeal, which seems cast more in terms of an *amicus curiae* than as a party challenging jurisdiction, provides an acceptable resolution of this question.

The Secretary's representation that he intends to abide by this Court's construction of the statute on the State's appeal does not in any strict sense of the word render moot the dispute between him and appellees. We are left therefore with a "subtle and complex question with far-reaching implications" going to the jurisdiction of the District Court over the Secretary, which was resolved by the District Court in favor of jurisdiction, but that has been inadequately briefed by the Secretary. This Court's Rule 40 (g).

Failure to comply with applicable Rules of this Court may result in the dismissal of an appeal of the defaulting party. *Sweezy* v. *New Hampshire,* 354 U. S. 234, 236 (1957); *Slagle* v. *Ohio,* 366 U. S. 259, 264 (1961); *Raley* v. *Ohio,* 360 U. S. 423, 435 (1959). Our only hesitancy in applying this principle to the Secretary's appeal arises because the issue goes to the jurisdiction of the District Court over the federal party, and we have repeatedly held that we must take note of want of jurisdiction in the district court even though neither party has raised the point. *Cutler* v. *Rae,* 7 How. 729, 731 (1849); *Mitchell* v. *Maurer,* 293 U. S. 237, 244 (1934); *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 588 (1939).

Application of the general rule that this Court has a duty to inquire into the jurisdiction of the district court would require that we address a complex question of federal jurisdiction notwithstanding the absence of substantial aid from the briefs of either of the parties. We believe, however, that the unusual context in which this appeal comes to us permits an exception to this general rule. Here the substantive issue decided by the District Court would have been decided by that court even if it had concluded that the Secretary was not properly a party to the suit, since appellant Philbrook was clearly a proper party under 28 U. S. C. § 1343 and the statu-

tory issues raised by appellees' claim against Philbrook were indistinguishable from those raised by their claim against the Secretary. Thus the only practical difference that resulted from the District Court's assumption of jurisdiction over the Secretary was that its injunction was directed against him as well as against appellant Philbrook. But the Secretary has announced, in his brief to this Court, that in the event the decision of the District Court on the statutory issue is affirmed, he intends to comply with it. The exercise of the District Court's jurisdiction over the Secretary in this case, therefore, has resulted in no adjudication on the merits that could not have been just as properly made without the Secretary, and has resulted in no issuance of process against the Secretary which he has properly contended to be wrongful before this Court.

The Secretary's appeal from the judgment in No. 74–132 is, therefore, dismissed.

It is so ordered.

Syllabus

BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–124. Argued March 24, 1975—Decided June 9, 1975

Under an antitrust consent decree petitioner New Blue Chip was required to offer a substantial number of common stock shares in its new trading stamp business to retailers like respondent which had previously used the stamp service but which were not shareholders in petitioner's corporate predecessor. Charging that New Blue Chip and other petitioners devised a scheme to dissuade the offerees by means of materially misleading statements containing an overly pessimistic appraisal of the new business from purchasing the securities so that the rejected shares might later be offered to the public at a higher price, respondent brought this class action for damages for violation of the provisions of § 10 (b) of the Securities Exchange Act of 1934 (Act) and Rule 10b–5 promulgated thereunder by the Securities and Exchange Commission (SEC), which make it unlawful to use deceptive devices or make misleading statements "in connection with the purchase or sale of any security." Acting on the basis of the rule enunciated in 1952 in *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461, which states that a person who is neither a purchaser nor a seller of securities may not bring an action under § 10 (b) of the Act or the SEC's Rule 10b–5, the District Court dismissed respondent's complaint. The Court of Appeals reversed, concluding that the facts warranted an exception to the *Birnbaum* rule. The court noted that prior cases had held that the rule did not exclude persons owning contractual rights to buy or sell securities and that the offering of securities in this case in compliance with the antitrust decree served the same function as a securities purchase or sales contract. *Held:* A private damages action under Rule 10b–5 is confined to actual purchasers or sellers of securities and the *Birnbaum* rule bars respondent from maintaining this suit. Pp. 731–755.

(a) The longstanding judicial acceptance of the rule together with Congress' failure to reject its interpretation of § 10 (b)

argues significantly in favor of this Court's acceptance of the rule. P. 733.

(b) Evidence from the texts of the Act and the Securities Act of 1933 supports the *Birnbaum* rule. When Congress wished to provide statutory remedies to others than purchasers or sellers of securities, it did so expressly. Pp. 733–736.

(c) Policy considerations predominantly favor adherence to the rule. Failure to follow it could well result in vexatious litigation caused by a widely expanded class of plaintiffs bringing "strike" suits under Rule 10b–5 and opening litigation to hazy factual issues the proof of which would largely depend on uncorroborated oral testimony to the effect that a person situated like respondent consulted the security issuer's prospectus, and paid attention to it, and that its representations injured him. Pp. 737–749.

(d) Respondent, who derives no entitlement from the antitrust decree and does not otherwise possess any contractual rights relating to the offered stock, occupies the same position as any other disappointed offeree of stock registered under the 1933 Act who claims that an overly pessimistic prospectus has caused him to pass up the chance to purchase, and there is ample evidence that Congress did not intend to extend a private cause of action for money damages to the nonpurchasing offeree of stock registered under the 1933 Act for loss of the opportunity to purchase due to an overly pessimistic prospectus. Pp. 749–754.

(e) The exception to the *Birnbaum* rule that the Court of Appeals relied upon would expose the rule to case-by-case erosion depending upon whether a particular group of plaintiffs was deemed more discrete than potential purchasers in general so as to warrant departing from the rule, and would result in an unsatisfactory basis for establishing liability for the conduct of business transactions. Pp. 754–755.

492 F. 2d 136, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 755. BLACKMUN, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 761.

Allyn O. Kreps argued the cause for petitioners. With

him on the briefs were *Michael D. Zimmerman, G. Richard Doty,* and *Thomas J. Ready.*

James E. Ryan argued the cause for respondent. With him on the brief was *J. J. Brandlin.*

David Ferber argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Lawrence E. Nerheim,* and *Richard E. Nathan.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to consider whether the offerees of a stock offering, made pursuant to an antitrust consent decree and registered under the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1933 Act), may maintain a private cause of action for money damages where they allege that the offeror has violated the provisions of Rule 10b–5 of the Securities and Exchange Commission, but where they have neither purchased nor sold any of the offered shares. See *Birnbaum* v. *Newport Steel Corp.,* 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952).

I

In 1963 the United States filed a civil antitrust action against Blue Chip Stamp Co. (Old Blue Chip), a company in the business of providing trading stamps to retailers, and nine retailers who owned 90% of its shares. In 1967 the action was terminated by the entry of a consent decree. *United States* v. *Blue Chip Stamp Co.,* 272 F. Supp. 432 (CD Cal.), aff'd *sub nom. Thrifty Shoppers Scrip Co.* v. *United States,* 389 U. S. 580 (1968).[1] The decree contemplated a plan of reorganiza-

[1] Neither respondent nor any of the members of its alleged class were parties to the antitrust action. The antitrust decree itself

tion whereby Old Blue Chip was to be merged into a newly formed corporation, Blue Chip Stamps (New Blue Chip). The holdings of the majority shareholders of Old Blue Chip were to be reduced, and New Blue Chip, one of the petitioners here, was required under the plan to offer a substantial number of its shares of common stock to retailers who had used the stamp service in the past but who were not shareholders in the old company. Under the terms of the plan, the offering to nonshareholder users was to be proportional to past stamp usage and the shares were to be offered in units consisting of common stock and debentures.

The reorganization plan was carried out, the offering was registered with the SEC as required by the 1933 Act, and a prospectus was distributed to all offerees as required by § 5 of that Act, 15 U. S. C. § 77e. Somewhat more than 50% of the offered units were actually purchased. In 1970, two years after the offering, respondent, a former user of the stamp service and therefore an offeree of the 1968 offering, filed this suit in the United States District Court for the Central District of California. Defendants below and petitioners here are Old and New Blue Chip, eight of the nine majority shareholders of Old Blue Chip, and the directors of New Blue Chip (collectively called Blue Chip).

Respondent's complaint alleged, *inter alia*, that the prospectus prepared and distributed by Blue Chip in connection with the offering was materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects. It alleged that Blue Chip intentionally made the prospectus overly pessimistic in order to discourage respondent and other members of the allegedly large class whom it represents from accepting what was

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provided no plan for the reorganization of Old Blue Chip but instead merely directed the parties to the consent decree to present to the court such a plan. App. 27, 31.

intended to be a bargain offer, so that the rejected shares might later be offered to the public at a higher price. The complaint alleged that class members because of and in reliance on the false and misleading prospectus failed to purchase the offered units. Respondent therefore sought on behalf of the alleged class some $21,400,000 in damages representing the lost opportunity to purchase the units; the right to purchase the previously rejected units at the 1968 price; and in addition, it sought some $25,000,000 in exemplary damages.

The only portion of the litigation thus initiated which is before us is whether respondent may base its action on Rule 10b–5 of the Securities and Exchange Commission without having either bought or sold the securities described in the allegedly misleading prospectus. The District Court dismissed respondent's complaint for failure to state a claim upon which relief might be granted.[2] On appeal to the United States Court of Appeals for the Ninth Circuit, respondent pressed only its asserted claim under Rule 10b–5, and a divided panel of the Court of Appeals sustained its position and reversed the District Court.[3] After the Ninth Circuit denied rehearing en banc, we granted Blue Chip's petition for certiorari. 419 U. S. 992 (1974). Our consideration of the correctness of the determination of the Court of Appeals requires us to consider what limitations there are on the class of plaintiffs who may maintain a private cause of action for money damages for violation of Rule 10b–5, and whether respondent was within that class.

II

During the early days of the New Deal, Congress enacted two landmark statutes regulating securities.

[2] The District Court opinion is reported at 339 F. Supp. 35 (1971).

[3] The Court of Appeals opinion is reported at 492 F. 2d 136 (1973).

The 1933 Act was described as an Act to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1934 Act), was described as an Act "to provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes."

The various sections of the 1933 Act dealt at some length with the required contents of registration statements and prospectuses, and expressly provided for private civil causes of action. Section 11 (a) gave a right of action by reason of a false registration statement to "any person acquiring" the security, and § 12 of that Act gave a right to sue the seller of a security who had engaged in proscribed practices with respect to prospectuses and communication to "the person purchasing such security from him."

The 1934 Act was divided into two titles. Title I was denominated "Regulation of Securities Exchanges," and Title II was denominated "Amendments to Securities Act of 1933." Section 10 of that Act makes it "unlawful for any person . . . (b) [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The "Commission" referred to in the section was the Securities and Exchange Commis-

sion created by § 4 (a) of the 1934 Act. Section 29 of that Act provided that "[e]very contract made in violation of any provision of this chapter or of any rule or regulation thereunder" should be void.

In 1942, acting under the authority granted to it by § 10 (b) of the 1934 Act, the Commission promulgated Rule 10b–5, 17 CFR § 240.10b–5, now providing as follows:

> "§ 240.10b–5 Employment of manipulative and deceptive devices.
>
> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security."

Section 10 (b) of the 1934 Act does not by its terms provide an express civil remedy for its violation. Nor does the history of this provision provide any indication that Congress considered the problem of private suits under it at the time of its passage. See, *e. g.*, Note, Implied Liability Under the Securities Exchange Act, 61 Harv. L. Rev. 858, 861 (1948); A. Bromberg, Securities Law: Fraud—SEC Rule 10b–5 § 2.2 (300)–(340) (1968) (hereinafter Bromberg); S. Rep. No. 792, 73d Cong., 2d

Sess., 5–6 (1934). Similarly there is no indication that the Commission in adopting Rule 10b–5 considered the question of private civil remedies under this provision. SEC Securities Exchange Act Release No. 3230 (1942); Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967); *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d, at 463; 3 L. Loss, Securities Regulation 1469 n. 87 (2d ed. 1961).

Despite the contrast between the provisions of Rule 10b–5 and the numerous carefully drawn express civil remedies provided in the Acts of both 1933 and 1934,[4] it was held in 1946 by the United States District Court for the Eastern District of Pennsylvania that there was an implied private right of action under the Rule. *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512. This Court had no occasion to deal with the subject until 25 years later, and at that time we confirmed with virtually no discussion the overwhelming consensus of the District Courts and Courts of Appeals that such a cause of action did exist. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13 n. 9 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154 (1972). Such a conclusion was, of course, entirely consistent with the Court's recognition in *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964), that private enforcement of Commission rules may "[provide] a necessary supplement to Commission action."

Within a few years after the seminal *Kardon* decision, the Court of Appeals for the Second Circuit concluded that the plaintiff class for purposes of a private damage action under § 10 (b) and Rule 10b–5 was limited to actual purchasers and sellers of securities. *Birnbaum* v. *Newport Steel Corp., supra.*

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[4] See, *e. g.*, §§ 11, 12, 15 of the 1933 Act, 15 U. S. C. §§ 77k, 77*l*, 77*o*; §§ 9, 16, 18, 20 of the 1934 Act, 15 U. S. C. §§ 78i, 78p, 78r, 78t.

The Court of Appeals in this case did not repudiate *Birnbaum;* indeed, another panel of that court (in an opinion by Judge Ely) had but a short time earlier affirmed the rule of that case. *Mount Clemens Industries, Inc.* v. *Bell,* 464 F. 2d 339 (1972). But in this case a majority of the Court of Appeals found that the facts warranted an exception to the *Birnbaum* rule. For the reasons hereinafter stated, we are of the opinion that *Birnbaum* was rightly decided, and that it bars respondent from maintaining this suit under Rule 10b–5.

III

The panel which decided *Birnbaum* consisted of Chief Judge Swan and Judges Learned Hand and Augustus Hand: the opinion was written by the last named. Since both § 10 (b) and Rule 10b–5 proscribed only fraud "in connection with the purchase or sale" of securities, and since the history of § 10 (b) revealed no congressional intention to extend a private civil remedy for money damages to other than defrauded purchasers or sellers of securities, in contrast to the express civil remedy provided by § 16 (b) of the 1934 Act, the court concluded that the plaintiff class in a Rule 10b–5 action was limited to actual purchasers and sellers. 193 F. 2d, at 463–464.

Just as this Court had no occasion to consider the validity of the *Kardon* holding that there was a private cause of action under Rule 10b–5 until 20-odd years later, nearly the same period of time has gone by between the *Birnbaum* decision and our consideration of the case now before us. As with *Kardon,* virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century have reaffirmed *Birnbaum*'s conclusion that the plaintiff class for purposes of § 10 (b) and Rule 10b–5 private damage actions is limited to purchasers and sell-

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ers of securities. See 6 L. Loss, Securities Regulation 3617 (1969). See, *e. g.*, *Haberman* v. *Murchison*, 468 F. 2d 1305, 1311 (CA2 1972); *Landy* v. *FDIC*, 486 F. 2d 139, 156–157 (CA3 1973), cert. denied, 416 U. S. 960 (1974); *Sargent* v. *Genesco, Inc.*, 492 F. 2d 750, 763 (CA5 1974); *Simmons* v. *Wolfson*, 428 F. 2d 455, 456 (CA6 1970), cert. denied, 400 U. S. 999 (1971); *City National Bank* v. *Vanderboom*, 422 F. 2d 221, 227–228 (CA8), cert. denied, 399 U. S. 905 (1970); *Mount Clemens Industries, Inc.* v. *Bell, supra; Jensen* v. *Voyles*, 393 F. 2d 131, 133 (CA10 1968). Compare *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960 (1974), with *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262 (CA7), cert. denied *sub nom. Bard* v. *Dasho*, 389 U. S. 977 (1967).

In 1957 and again in 1959, the Securities and Exchange Commission sought from Congress amendment of § 10 (b) to change its wording from "in connection with the purchase or sale of any security" to "in connection with the purchase or sale of, *or any attempt to purchase or sell*, any security." 103 Cong. Rec. 11636 (1957) (emphasis added); SEC Legislation, Hearings on S. 1178–1182 before a Subcommittee of the Senate Committee on Banking & Currency, 86th Cong., 1st Sess., 367–368 (1959); S. 2545, 85th Cong., 1st Sess. (1957); S. 1179, 86th Cong., 1st Sess. (1959). In the words of a memorandum submitted by the Commission to a congressional committee, the purpose of the proposed change was "to make section 10 (b) also applicable to manipulative activities in connection with any attempt to purchase or sell any security." Hearings on S. 1178–1182, *supra*, at 331. Opposition to the amendment was based on fears of the extension of civil liability under § 10 (b) that it would cause. *Id.*, at 368. Neither change was adopted by Congress.

The longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum*'s reasonable interpretation of the wording of § 10 (b), wording which is directed toward injury suffered "in connection with the purchase or sale" of securities,[5] argues significantly in favor of acceptance of the *Birnbaum* rule by this Court. *Blau* v. *Lehman*, 368 U. S. 403, 413 (1962).

Available evidence from the texts of the 1933 and 1934 Acts as to the congressional scheme in this regard, though not conclusive, supports the result reached by the *Birnbaum* court. The wording of § 10 (b) directed at fraud "in connection with the purchase or sale" of securities stands in contrast with the parallel antifraud provision of the 1933 Act, § 17 (a), as amended, 68 Stat. 686, 15 U. S. C. § 77q,[6] reaching fraud

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[5] MR. JUSTICE BLACKMUN, dissenting, *post*, at 764–765, finds support in the literal language of § 10 (b) since he concludes that in his view "the word 'sale' ordinarily and naturally may be understood to mean, not only a single, individualized act transferring property from one party to another, but also the generalized event of public disposal of property through advertisement, auction, or some other market mechanism." But this ignores the fact that this carefully drawn statute itself defines the term "sale" for purposes of the Act, and, as we have noted, *infra*, at 751 n. 13, Congress expressly deleted from the Act's definition events such as offers and advertisements which may ultimately lead to a completed sale. Moreover, the extension of the word "sale" to include offers is quite incompatible with Congress' separate definition and use of these terms in the 1933 and 1934 Acts. Cf. § 2 (3) of the 1933 Act, 15 U. S. C. § 77b (3). Beyond this, the wording of § 10 (b), making fraud *in connection with the purchase or sale of a security* a violation of the Act, is surely badly strained when construed to provide a cause of action, not to purchasers and sellers of securities, but to the world at large.

[6] Section 17 (a) of the 1933 Act provides in wording virtually identical to that of Rule 10b–5 with the exception of the italicized portion that:

"It shall be unlawful for any person *in the offer* or sale of any securities by the use of any means or instruments of transportation

"in the offer or sale" of securities. Cf. § 5 of the 1933 Act, 15 U. S. C. § 77e. When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly. Cf. § 16 (b) of the 1934 Act, 15 U. S. C. § 78p (b).

Section 28 (a) of the 1934 Act, 15 U. S. C. § 78bb (a), which limits recovery in any private damages action brought under the 1934 Act to "actual damages," likewise provides some support for the purchaser-seller rule. See, *e. g.*, Bromberg § 8.8, p. 221. While the damages suffered by purchasers and sellers pursuing a § 10 (b) cause of action may on occasion be difficult to ascertain, *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 155, in the main such purchasers and sellers at least seek to base recovery on a demonstrable number of shares traded. In contrast, a putative plaintiff, who neither purchases nor sells securities but sues instead for intangible economic injury such as loss of a noncontractual opportunity to buy or sell, is more likely to be seeking a

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or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." (Emphasis added.)

We express, of course, no opinion on whether § 17 (a) in light of the express civil remedies of the 1933 Act gives rise to an implied cause of action. Compare *Greater Iowa Corp.* v. *McLendon*, 378 F. 2d 783, 788–791 (CA8 1967), with *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 (CA2 1951). See, *e. g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (CA2 1968) (Friendly, J., concurring), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969); 3 L. Loss, Securities Regulation 1785 (2d ed. 1961).

largely conjectural and speculative recovery in which the number of shares involved will depend on the plaintiff's subjective hypothesis. Cf. *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F. 2d 527, 533 (CA10 1962); *Levine* v. *Seilon, Inc.*, 439 F. 2d 328, 335 (CA2 1971); *Wolf* v. *Frank*, 477 F. 2d 467, 478 (CA5 1973).

One of the justifications advanced for implication of a cause of action under § 10 (b) lies in § 29 (b) of the 1934 Act, 15 U. S. C. § 78cc (b), providing that a contract made in violation of any provision of the 1934 Act is voidable at the option of the deceived party.[7] See, *e. g.*, *Kardon* v. *National Gypsum Co.*, 69 F. Supp., at 514; *Slavin* v. *Germantown Fire Insurance Co.*, 174 F. 2d 799, 815 (CA3 1949); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787 n. 4 (CA2 1951); Bromberg § 2.4 (1)(b). But that justification is absent when there is no actual purchase or sale of securities, or a contract to purchase or sell, affected or tainted by a violation of § 10 (b). Cf. *Mount Clemens Industries, Inc.* v. *Bell*, *supra*.

The principal express nonderivative private civil reme-

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[7] Section 29 (b) of the 1934 Act provides in part:

"Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation . . . ."

Cf. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940).

dies, created by Congress contemporaneously with the passage of § 10 (b), for violations of various provisions of the 1933 and 1934 Acts are by their terms expressly limited to purchasers or sellers of securities. Thus § 11 (a) of the 1933 Act confines the cause of action it grants to "any person acquiring such security" while the remedy granted by § 12 of that Act is limited to the "person purchasing such security." Section 9 of the 1934 Act, prohibiting a variety of fraudulent and manipulative devices, limits the express civil remedy provided for its violation to "any person who shall purchase or sell any security" in a transaction affected by a violation of the provision. Section 18 of the 1934 Act, prohibiting false or misleading statements in reports or other documents required to be filed by the 1934 Act, limits the express remedy provided for its violation to "any person . . . who . . . shall have purchased or sold a security at a price which was affected by such statement . . . ." It would indeed be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action.[8]

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[8] MR. JUSTICE BLACKMUN, dissenting, *post*, at 762, finds the *Birnbaum* rule incompatible with the purpose and history of § 10 (b) and Rule 10b–5. But it is worthy of more than passing note that the history of Rule 10b–5 itself, recounted at some length in the dissent, *post*, at 766–767, strongly supports the purchaser-seller limitation. As the dissent notes, Rule 10b–5 was adopted in order to close "a loophole in the protections against fraud . . . by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." See SEC Release No. 3230 (May 21, 1942); remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967). The modest aims and origins of the Rule as recounted by the dissent stand in stark contrast with its far-ranging conclusion that a remedy exists under Rule 10b–5 whenever there is "a logical nexus between the alleged fraud and the sale or purchase of a security." *Post*, at

Having said all this, we would by no means be understood as suggesting that we are able to divine from the language of § 10 (b) the express "intent of Congress" as to the contours of a private cause of action under Rule 10b–5. When we deal with private actions under Rule 10b–5, we deal with a judicial oak which has grown from little more than a legislative acorn. Such growth may be quite consistent with the congressional enactment and with the role of the federal judiciary in interpreting it, see *J. I. Case Co.* v. *Borak, supra,* but it would be disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present state of the law with respect to Rule 10b–5. It is therefore proper that we consider, in addition to the factors already discussed, what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance.

Three principal classes of potential plaintiffs are presently barred by the *Birnbaum* rule. First are potential purchasers of shares, either in a new offering or on the Nation's post-distribution trading markets, who allege that they decided not to purchase because of an unduly gloomy representation or the omission of favorable material which made the issuer appear to be a less favorable investment vehicle than it actually was. Second are actual shareholders in the issuer who allege that they decided not to sell their shares because of an

770. On these facts, as we have indicated, *infra,* at 752–754, extension of a Rule 10b–5 cause of action, far from closing an unforeseen loophole, would extend a private right of action for misrepresentations in a 1933 Act prospectus to those whom Congress excluded from the express civil remedies provided in the 1933 Act to cover such a violation.

unduly rosy representation or a failure to disclose unfavorable material. Third are shareholders, creditors, and perhaps others related to an issuer who suffered loss in the value of their investment due to corporate or insider activities in connection with the purchase or sale of securities which violate Rule 10b–5. It has been held that shareholder members of the second and third of these classes may frequently be able to circumvent the *Birnbaum* limitation through bringing a derivative action on behalf of the corporate issuer if the latter is itself a purchaser or seller of securities. See, *e. g.*, *Schoenbaum* v. *Firstbrook*, 405 F. 2d 215, 219 (CA2 1968), cert. denied *sub nom. Manley* v. *Schoenbaum*, 395 U. S. 906 (1969). But the first of these classes, of which respondent is a member, cannot claim the benefit of such a rule.

A great majority of the many commentators on the issue before us have taken the view that the *Birnbaum* limitation on the plaintiff class in a Rule 10b–5 action for damages is an arbitrary restriction which unreasonably prevents some deserving plaintiffs from recovering damages which have in fact been caused by violations of Rule 10b–5. See, *e. g.*, Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968). The Securities and Exchange Commission has filed an *amicus* brief in this case espousing that same view. We have no doubt that this is indeed a disadvantage of the *Birnbaum* rule,[9] and if it

[9] Obviously this disadvantage is attenuated to the extent that remedies are available to nonpurchasers and nonsellers under state law. Cf. § 28 of the 1934 Act, 15 U. S. C. § 78bb. See *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d 963, 969 (CA2 1969), cert. denied, 399 U. S. 909 (1970). Thus, for example, in *Birnbaum* itself, while the plaintiffs found themselves without federal remedies, the conduct alleged as the gravamen of the federal complaint later provided the basis for recovery in a cause of action based on state law. See 3 L. Loss, Securities Regulation 1469 (2d

had no countervailing advantages it would be undesirable as a matter of policy, however much it might be supported by precedent and legislative history. But we are of the opinion that there are countervailing advantages to the *Birnbaum* rule, purely as a matter of policy, although those advantages are more difficult to articulate than is the disadvantage.

There has been widespread recognition that litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. This fact was recognized by Judge Browning in his opinion for the majority of the Court of Appeals in this case, 492 F. 2d, at 141, and by Judge Hufstedler in her dissenting opinion when she said:

> "The purchaser-seller rule has maintained the balances built into the congressional scheme by permitting damage actions to be brought only by those persons whose active participation in the marketing transaction promises enforcement of the statute without undue risk of abuse of the litigation process and without distorting the securities market." *Id.*, at 147.

Judge Friendly in commenting on another aspect of Rule 10b–5 litigation has referred to the possibility that unduly expansive imposition of civil liability "will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers . . . ." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 867 (CA2 1968) (concurring opinion). See also

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ed. 1961). And in the immediate case, respondent has filed a state-court class action held in abeyance pending the outcome of this suit. *Manor Drug Stores* v. *Blue Chip Stamps*, No. C–5652 (Superior Court, County of Los Angeles, Cal.)

Boone & McGowan, Standing to Sue under SEC Rule 10b–5, 49 Tex. L. Rev. 617, 648–649 (1971).

We believe that the concern expressed for the danger of vexatious litigation which could result from a widely expanded class of plaintiffs under Rule 10b–5 is founded in something more substantial than the common complaint of the many defendants who would prefer avoiding lawsuits entirely to either settling them or trying them. These concerns have two largely separate grounds.

The first of these concerns is that in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit. See, *e. g.*, Sargent, The SEC and the Individual Investor: Restoring His Confidence in the Market, 60 Va. L. Rev. 553, 562–572 (1974); Dooley, The Effects of Civil Liability on Investment Banking and the New Issues Market, 58 Va. L. Rev. 776, 822–843 (1972).

Congress itself recognized the potential for nuisance or "strike" suits in this type of litigation, and in Title II of the 1934 Act amended § 11 of the 1933 Act to provide that:

> "In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees . . . ." § 206 (d), 48 Stat. 881, 908.

Senator Fletcher, Chairman of the Senate Banking and Finance Committee, in introducing Title II of the 1934

Act on the floor of the Senate, stated in explaining the amendment to § 11 (e): "This amendment is the most important of all." 78 Cong. Rec. 8669. Among its purposes was to provide "a defense against blackmail suits." *Ibid.*

Where Congress in those sections of the 1933 Act which expressly conferred a private cause of action for damages, adopted a provision uniformly regarded as designed to deter "strike" or nuisance actions, *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 548–549 (1949), that fact alone justifies our consideration of such potential in determining the limits of the class of plaintiffs who may sue in an action wholly implied from the language of the 1934 Act.

The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation. The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation. To the extent that this process eventually produces relevant evidence which is useful in determining the merits of the claims asserted by the parties, it bears the imprimatur of those Rules and of the many cases liberally interpreting them. But to the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit. Yet to broadly expand the class of plaintiffs who may sue under Rule 10b–5 would appear to encourage the least appealing aspect of the use of the discovery rules.

Without the *Birnbaum* rule, an action under Rule 10b–5 will turn largely on which oral version of a series of occurrences the jury may decide to credit, and therefore no matter how improbable the allegations of the plaintiff, the case will be virtually impossible to dispose of prior to trial other than by settlement. In the words of Judge Hufstedler's dissenting opinion in the Court of Appeals:

> "The great ease with which plaintiffs can allege the requirements for the majority's standing rule and the greater difficulty that plaintiffs are going to have proving the allegations suggests that the majority's rule will allow a relatively high proportion of 'bad' cases into court. The risk of strike suits is particularly high in such cases; although they are difficult to prove at trial, they are even more difficult to dispose of before trial." 492 F. 2d, at 147 n. 9.

The *Birnbaum* rule, on the other hand, permits exclusion prior to trial of those plaintiffs who were not themselves purchasers or sellers of the stock in question. The fact of purchase of stock and the fact of sale of stock are generally matters which are verifiable by documentation, and do not depend upon oral recollection, so that failure to qualify under the *Birnbaum* rule is a matter that can normally be established by the defendant either on a motion to dismiss or on a motion for summary judgment.

Obviously there is no general legal principle that courts in fashioning substantive law should do so in a manner which makes it easier, rather than more difficult, for a defendant to obtain a summary judgment. But in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive dis-

covery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed. The *Birnbaum* rule undoubtedly excludes plaintiffs who have in fact been damaged by violations of Rule 10b–5, and to that extent it is undesirable. But it also separates in a readily demonstrable manner the group of plaintiffs who actually purchased or actually sold, and whose version of the facts is therefore more likely to be believed by the trier of fact, from the vastly larger world of potential plaintiffs who might successfully allege a claim but could seldom succeed in proving it. And this fact is one of its advantages.

The second ground for fear of vexatious litigation is based on the concern that, given the generalized contours of liability, the abolition of the *Birnbaum* rule would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony. We in no way disparage the worth and frequent high value of oral testimony when we say that dangers of its abuse appear to exist in this type of action to a peculiarly high degree. The Securities and Exchange Commission, while opposing the adoption of the *Birnbaum* rule by this Court, states that it agrees with petitioners "that the effect, if any, of a deceptive practice on someone who has neither purchased nor sold securities may be more difficult to demonstrate than is the effect on a purchaser or seller." Brief for the Securities and Exchange Commission as *Amicus Curiae* 24–25. The brief also points out that frivolous suits can be brought whatever the rules of standing, and reminds us of this Court's recognition "in a different context" that "the expense and annoyance of litigation is 'part of the social burden of living under

government.'" *Id.*, at 24 n. 30. See *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U. S. 209, 222 (1938). The Commission suggests that in particular cases additional requirements of corroboration of testimony and more limited measure of damages would correct the dangers of an expanded class of plaintiffs.

But the very necessity, or at least the desirability, of fashioning unique rules of corroboration and damages as a correlative to the abolition of the *Birnbaum* rule suggests that the rule itself may have something to be said for it.

In considering the policy underlying the *Birnbaum* rule, it is not inappropriate to advert briefly to the tort of misrepresentation and deceit, to which a claim under Rule 10b–5 certainly has some relationship. Originally under the common law of England such an action was not available to one other than a party to a business transaction. That limitation was eliminated in *Pasley* v. *Freeman*, 3 T. R. 51, 100 Eng. Rep. 450 (1789). Under the earlier law the misrepresentation was generally required to be one of fact, rather than opinion, but that requirement, too, was gradually relaxed. Lord Bowen's famous comment in *Edgington* v. *Fitzmaurice*, [1882] L. R. 29 Ch. Div. 459, 483, that "the state of a man's mind is as much a fact as the state of his digestion," suggests that this distinction, too, may have been somewhat arbitrary. And it has long been established in the ordinary case of deceit that a misrepresentation which leads to a refusal to purchase or to sell is actionable in just the same way as a misrepresentation which leads to the consummation of a purchase or sale. *Butler* v. *Watkins*, 13 Wall. 456 (1872). These aspects of the evolution of the tort of deceit and misrepresentation suggest a direction away from rules such as *Birnbaum*.

But the typical fact situation in which the classic tort

of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b–5 is applicable. The plaintiff in *Butler, supra,* for example, claimed that he had held off the market a patented machine for tying cotton bales which he had developed by reason of the fraudulent representations of the defendant. But the report of the case leaves no doubt that the plaintiff and defendant met with one another in New Orleans, that one presented a draft agreement to the other, and that letters were exchanged relating to that agreement. Although the claim to damages was based on an allegedly fraudulently induced decision not to put the machines on the market, the plaintiff and the defendant had concededly been engaged in the course of business dealings with one another, and would presumably have recognized one another on the street had they met.

In today's universe of transactions governed by the 1934 Act, privity of dealing or even personal contact between potential defendant and potential plaintiff is the exception and not the rule. The stock of issuers is listed on financial exchanges utilized by tens of millions of investors, and corporate representations reach a potential audience, encompassing not only the diligent few who peruse filed corporate reports or the sizable number of subscribers to financial journals, but the readership of the Nation's daily newspapers. Obviously neither the fact that issuers or other potential defendants under Rule 10b–5 reach a large number of potential investors, or the fact that they are required by law to make their disclosures conform to certain standards, should in any way absolve them from liability for misconduct which is proscribed by Rule 10b–5.

But in the absence of the *Birnbaum* rule, it would be sufficient for a plaintiff to prove that he had failed to

purchase or sell stock by reason of a defendant's violation of Rule 10b–5. The manner in which the defendant's violation caused the plaintiff to fail to act could be as a result of the reading of a prospectus, as respondent claims here, but it could just as easily come as a result of a claimed reading of information contained in the financial pages of a local newspaper. Plaintiff's proof would not be that he purchased or sold stock, a fact which would be capable of documentary verification in most situations, but instead that he decided *not* to purchase or sell stock. Plaintiff's entire testimony could be dependent upon uncorroborated oral evidence of many of the crucial elements of his claim, and still be sufficient to go to the jury. The jury would not even have the benefit of weighing the plaintiff's version against the defendant's version, since the elements to which the plaintiff would testify would be in many cases totally unknown and unknowable to the defendant. The very real risk in permitting those in respondent's position to sue under Rule 10b–5 is that the door will be open to recovery of substantial damages on the part of one who offers only his own testimony to prove that he ever consulted a prospectus of the issuer, that he paid any attention to it, or that the representations contained in it damaged him.[10]

[10] The SEC, recognizing the necessity for limitations on nonpurchaser, nonseller plaintiffs in the absence of the *Birnbaum* rule, suggests two such limitations to mitigate the practical adverse effects flowing from abolition of the rule. First, it suggests requiring some corroborative evidence in addition to oral testimony tending to show that the investment decision of a plaintiff was affected by an omission or misrepresentation. Brief for the Securities and Exchange Commission as *Amicus Curiae* 25–26. Apparently ownership of stock or receipt of a prospectus or press release would be sufficient corroborative evidence in the view of the SEC to reach the jury. We do not believe that such a requirement would adequately respond to the concerns in part underlying the *Birnbaum* rule. Ownership of stock or receipt of a prospectus says little about

The virtue of the *Birnbaum* rule, simply stated, in this situation, is that it limits the class of plaintiffs to those who have at least dealt in the security to which the prospectus, representation, or omission relates. And their dealing in the security, whether by way of purchase or sale, will generally be an objectively demonstrable fact in an area of the law otherwise very much dependent upon oral testimony. In the absence of the *Birnbaum* doctrine, bystanders to the securities marketing process could await developments on the sidelines without risk, claiming that inaccuracies in disclosure caused nonselling in a falling market and that unduly pessimistic predictions by the issuer followed by a rising market caused them to allow retrospectively golden opportunities to pass.

While much of the development of the law of deceit has been the elimination of artificial barriers to recovery on just claims, we are not the first court to express concern that the inexorable broadening of the class of plain-

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whether a plaintiff's investment decision was affected by a violation of Rule 10b–5 or whether a decision was even made. Second, the SEC would limit the vicarious liability of corporate issuers to nonpurchasers and nonsellers to situations where the corporate issuer has been unjustly enriched by a violation. We have no occasion to pass upon the compatibility of this limitation with § 20 (a) of the 1934 Act, 15 U. S. C. § 78t (a). We do not believe that this proposed limitation is relevant to the concerns underlying in part the *Birnbaum* rule as we have expressed them. We are not alone in feeling that the limitations proposed by the SEC are not adequate to deal with the adverse effects which would flow from abolition of the *Birnbaum* rule. See, *e. g.*, *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627, 636 (CA2), cert. denied, 389 U. S. 970 (1967); *Iroquois Industries, Inc.* v. *Syracuse China Corp.*, 417 F. 2d, at 967; *Rekant* v. *Desser*, 425 F. 2d 872, 879 (CA5 1970); *GAF Corp.* v. *Milstein*, 453 F. 2d 709, 721 (CA2 1971), cert. denied, 406 U. S. 910 (1972); *Drachman* v. *Harvey*, 453 F. 2d 722, 736, 738 (CA2 1972) (en banc); *Mount Clemens Industries, Inc.* v. *Bell*, 464 F. 2d 339, 341 (CA9 1972).

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tiff who may sue in this area of the law will ultimately result in more harm than good. In *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441 (1931), Chief Judge Cardozo observed with respect to "a liability in an indeterminate amount for an indeterminate time to an indeterminate class":

> "The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences." *Id.*, at 179–180, 174 N. E., at 444.

In *Herpich* v. *Wallace*, 430 F. 2d 792, 804–805 (CA5 1970), a case adopting the *Birnbaum* limitation on the class of plaintiffs who might bring an action for damages based on a violation of Rule 10b–5, Judge Ainsworth expressed concern similar to that expressed by Chief Judge Cardozo. Judge Stevens, writing in *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d, at 660, stated that court's view that these concerns were unduly emphasized, and went on to say that "we may not for that reason reject what we believe to be a correct interpretation of the statute or the rule." He relied in part on the view that Rule 10b–5 should be interpreted, in keeping with this Court's repeated admonition, "'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 151.

We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability. But as we have pointed out, we are not dealing here with

any private right created by the express language of § 10 (b) or of Rule 10b–5. No language in either of those provisions speaks at all to the contours of a private cause of action for their violation. However flexibly we may construe the language of both provisions, nothing in such construction militates against the *Birnbaum* rule. We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question. Given the peculiar blend of legislative, administrative, and judicial history which now surrounds Rule 10b–5, we believe that practical factors to which we have adverted, and to which other courts have referred, are entitled to a good deal of weight.

Thus we conclude that what may be called considerations of policy, which we are free to weigh in deciding this case, are by no means entirely on one side of the scale. Taken together with the precedential support for the *Birnbaum* rule over a period of more than 20 years, and the consistency of that rule with what we can glean from the intent of Congress, they lead us to conclude that it is a sound rule and should be followed.

IV

The majority of the Court of Appeals in this case expressed no disagreement with the general proposition that one asserting a claim for damages based on the violation of Rule 10b–5 must be either a purchaser or seller of securities. However, it noted that prior cases have held that persons owning contractual rights to buy or sell securities are not excluded by the *Birnbaum* rule. Relying on these cases, it concluded that respondent's status as an offeree pursuant to the terms of the consent decree served the same function, for purposes

of delimiting the class of plaintiffs, as is normally performed by the requirement of a contractual relationship. 492 F. 2d, at 142.

The Court of Appeals recognized, and respondent concedes here,[11] that a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it. *United States* v. *Armour & Co.*, 402 U. S. 673 (1971); *Buckeye Co.* v. *Hocking Valley Co.*, 269 U. S. 42 (1925).[12]

A contract to purchase or sell securities is expressly defined by § 3 (a) of the 1934 Act, 15 U. S. C. § 78c (a),[13]

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[11] See Brief for Respondent 60.

[12] See n. 1, *supra;* 492 F. 2d, at 144 n. 3 (Hufstedler, J., dissenting).

[13] Section 3 (a)(13) of the 1934 Act, 15 U. S. C. § 78c (a)(13), provides:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."

Section 3 (a)(14) of the 1934 Act, 15 U. S. C. § 78c (a)(14), provides:

"The terms 'sale' and 'sell' each include any contract to sell or otherwise dispose of."

These provisions as enacted starkly contrast with the wording of the bill which became the 1934 Act when it emerged from committee and was presented on the Senate floor by Senator Fletcher, the chairman of the Senate Committee on Banking and Finance. See S. 2693, 73d Cong., 2d Sess. (1934). Section 3 (11) of the bill as presented to the Senate provided:

"The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire, contract of purchase, *attempt or offer to acquire or solicitation of an offer to sell a security or any interest in a security.*" (Emphasis added.)

And § 3 (12) of the bill provided:

"The terms 'sale' and 'sell' each include any contract of sale or disposition of, contract to sell or dispose of, *attempt or offer to*

as a purchase or sale of securities for the purposes of that Act. Unlike respondent, which had no contractual right or duty to purchase Blue Chip's securities, the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities have been recognized as "purchasers" or "sellers" of securities for purposes of Rule 10b–5, not because of a judicial conclusion that they were similarly situated to "purchasers" or "sellers," but because the definitional provisions of the 1934 Act themselves grant them such a status.

Even if we were to accept the notion that the *Birnbaum* rule could be circumvented on a case-by-case basis through particularized judicial inquiry into the facts surrounding a complaint, this respondent and the members of its alleged class would be unlikely candidates for such a judicially created exception. While the *Birnbaum* rule has been flexibly interpreted by lower federal courts,[14] we have been unable to locate a single decided case from any court in the 20-odd years of litigation since the *Birnbaum* decision which would support the right of persons who were in the position of respondent here to bring a private suit under Rule 10b–5. Respondent was not only not a buyer or seller of any security

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dispose of, or solicitation of an offer to buy a security or any interest therein." (Emphasis added.)

During consideration of the bill on the Senate floor, the ambit of these provisions was narrowed through amendment into the present wording of §§ 3 (a) (13) and (14). 48 Stat. 884. In arguing that it, as an offeree of stock, ought to be treated as a purchaser or seller for purposes of the Act, respondent is in effect seeking a judicial reinsertion of language into the Act that Congress had before it but deleted prior to passage.

[14] Our decision in *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969), established that the purchaser-seller rule imposes no limitation on the standing of the SEC to bring actions for injunctive relief under § 10 (b) and Rule 10b–5.

but it was not even a shareholder of the corporate petitioners.

As indicated, the 1934 Act, under which respondent seeks to assert a cause of action, is general in scope but chiefly concerned with the regulation of post-distribution trading on the Nation's stock exchanges and securities trading markets. The 1933 Act is a far narrower statute chiefly concerned with disclosure and fraud in connection with offerings of securities—primarily, as here, initial distributions of newly issued stock from corporate issuers. 1 L. Loss, Securities Regulation 130–131 (2d ed. 1961). Respondent, who derives no entitlement from the antitrust consent decree and does not otherwise possess any contractual rights relating to the offered stock, stands in the same position as any other disappointed offeree of a stock offering registered under the 1933 Act who claims that an overly pessimistic prospectus, prepared and distributed as required by §§ 5 and 10 of the 1933 Act, has caused it to allow its opportunity to purchase to pass.

There is strong evidence that application of the *Birnbaum* rule to preclude suit by the disappointed offeree of a registered 1933 Act offering under Rule 10b–5 furthers the intention of Congress as expressed in the 1933 Act.[15] Congress left little doubt that its purpose in imposing the prospectus and registration requirements of the 1933 Act was to prevent the "[h]igh pressure salesmanship rather than careful counsel," causing inflated

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[15] Blue Chip did not here present the question of whether an implied action under § 10 (b) of the 1934 Act and Rule 10b–5 will lie for actions made a violation of the 1933 Act and the subject of express civil remedies under the 1933 Act. We therefore have no occasion to pass on this issue. Compare *Rosenberg* v. *Globe Aircraft Corp.*, 80 F. Supp. 123 (ED Pa. 1948), with *Thiele* v. *Shields*, 131 F. Supp. 416 (SDNY 1955). Cf. 3 L. Loss, Securities Regulation 1787–1791 (2d ed. 1961); 6 L. Loss, Securities Regulation 3915–3917 (1969); Bromberg § 2.4 (2).

new issues, through direct limitation by the SEC of "the selling arguments hitherto employed." H. R. Rep. No. 85, 73d Cong., 1st Sess., 2, 8 (1933).

> "Any objection that the compulsory incorporation in selling literature and sales argument of substantially all information concerning the issue, will frighten the buyer with the intricacy of the transaction, states one of the best arguments for the provision." *Id.*, at 8.

The SEC, in accord with the congressional purposes, specifically requires prominent emphasis be given in filed registration statements and prospectuses to material adverse contingencies. See, *e. g.*, SEC Securities Act Release No. 4936, Guides for the Preparation and Filing of Registration Statements 6, ¶ 6 (1968); *In re Universal Camera Corp.*, 19 S. E. C. 648, 654–656 (1945); Wheat & Blackstone, Guideposts for a First Public Offering, 15 Bus. Law. 539, 560–562 (1960).

Sections 11 and 12 of the 1933 Act provide express civil remedies for misrepresentations and omissions in registration statements and prospectuses filed under the Act, as here charged, but restrict recovery to the offering price of shares actually purchased:

> "To impose a greater responsibility, apart from constitutional doubts, would unnecessarily restrain the conscientious administration of honest business with no compensating advantage to the public." H. R. Rep. No. 85, *supra*, at 9.

And in Title II of the 1934 Act, 48 Stat. 905–908, the same Act adopting § 10 (b), Congress amended § 11 of the 1933 Act to limit still further the express civil remedy it conferred. See generally James, Amendments to the Securities Act of 1933, 32 Mich. L. Rev. 1130, 1134 (1934). The additional congressional restrictions,

contained in Title II of the 1934 Act, on the already limited express civil remedies provided by the 1933 Act for misrepresentations or omissions in a registration statement or prospectus reflected congressional concern over the impact of even these limited remedies on the new issues market. 78 Cong. Rec. 8668–8669 (1934). There is thus ample evidence that Congress did not intend to extend a private cause of action for money damages to the nonpurchasing offeree of a stock offering registered under the 1933 Act for loss of the opportunity to purchase due to an overly pessimistic prospectus.

Beyond the difficulties evident in an extension of standing to this respondent, we do not believe that the *Birnbaum* rule is merely a shorthand judgment on the nature of a particular plaintiff's proof. As a purely practical matter, it is doubtless true that respondent and the members of its class, as offerees and recipients of the prospectus of New Blue Chip, are a smaller class of potential plaintiffs than would be all those who might conceivably assert that they obtained information violative of Rule 10b–5 and attributable to the issuer in the financial pages of their local newspaper. And since respondent likewise had a prior connection with some of petitioners as a result of using the trading stamps marketed by Old Blue Chip, and was intended to benefit from the provisions of the consent decree, there is doubtless more likelihood that its managers read and were damaged by the allegedly misleading statements in the prospectus than there would be in a case filed by a complete stranger to the corporation.

But respondent and the members of its class are neither "purchasers" nor "sellers," as those terms are defined in the 1934 Act, and therefore to the extent that their claim of standing to sue were recognized, it would mean that the lesser practical difficulties of corroborating

at least some elements of their proof would be regarded as sufficient to avoid the *Birnbaum* rule. While we have noted that these practical difficulties, particularly in the case of a complete stranger to the corporation, support the retention of that rule, they are by no means the only factor which does so. The general adoption of the rule by other federal courts in the 25 years since it was announced, and the consistency of the rule with the statutes involved and their legislative history, are likewise bases for retaining the rule. Were we to agree with the Court of Appeals in this case, we would leave the *Birnbaum* rule open to endless case-by-case erosion depending on whether a particular group of plaintiffs was thought by the court in which the issue was being litigated to be sufficiently more discrete than the world of potential purchasers at large to justify an exception. We do not believe that such a shifting and highly fact-oriented disposition of the issue of who may bring a damages claim for violation of Rule 10b–5 is a satisfactory basis for a rule of liability imposed on the conduct of business transactions. Nor is it as consistent as a straightforward application of the *Birnbaum* rule with the other factors which support the retention of that rule. We therefore hold that respondent was not entitled to sue for violation of Rule 10b–5, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring.

Although I join the opinion of the Court, I write to emphasize the significance of the texts of the Acts of 1933 and 1934 and especially the language of § 10 (b) and Rule 10b–5.

I

The starting point in every case involving construction of a statute is the language itself. The critical phrase in both the statute and the Rule is "in connection with the *purchase* or *sale* of any security." 15 U. S. C. § 78j (b); 17 CFR § 240.10b–5 (1975) (emphasis added). Section 3 (a)(14) of the 1934 Act, 15 U. S. C. § 78c (a)(14), provides that the term "sale" shall "include any contract to sell or otherwise dispose of" securities. There is no hint in any provision of the Act that the term "sale," as used in § 10 (b), was intended—in addition to its long-established legal meaning—to include an "offer to sell." Respondent, nevertheless, would have us amend the controlling language in § 10 (b) to read:

> "in connection with the purchase or sale of, or an offer to sell, any security."

Before a court properly could consider taking such liberty with statutory language there should be, at least, unmistakable support in the history and structure of the legislation. None exists in this case.

Nothing in the history of the 1933 and 1934 Acts supports any congressional intent to include mere offers in § 10 (b). Moreover, as the Court's opinion indicates, impressive evidence in the texts of the two Acts demonstrates clearly that Congress selectively and carefully distinguished between offers, purchases, and sales. For example, § 17 (a), the antifraud provision of the 1933 Act, 15 U. S. C. § 77q (a), expressly includes "offer[s]" of securities within its terms while § 10 (b) of the 1934 Act and Rule 10b–5 do not. The 1933 Act also defines "offer to sell" as something distinct from a sale. § 2 (3), 15 U. S. C. § 77b (3).

If further evidence of congressional intent were needed, it may be found in the subsequent history of these Acts.

As noted in the Court's opinion, the Securities and Exchange Commission unsuccessfully sought, in 1957 and again in 1959, to persuade Congress to broaden § 10 (b) by adding to the critical language: "or any attempt to purchase or sell" any security. See *ante*, at 732.

This case involves no "purchase or sale" of securities.[1] Respondent was a mere offeree, which instituted this suit some two years after the shares were issued and after the market price had soared. Having "missed the market" on a stock, it is hardly in a unique position. The capital that fuels our enterprise system comes from investors who have frequent opportunities to purchase, or not to purchase, securities being offered publicly. The market prices of new issues rarely remain static: almost invariably they go up or down, and they often fluctuate widely over a period far less than the two years during which respondent reflected on its lost opportunity. Most investors have unhappy memories of decisions not to buy stocks which later performed well.

The opinion of the Court, and the dissenting opinion of Judge Hufstedler in the Court of Appeals, correctly emphasize the subjective nature of the inevitable inquiry if the term "offer" were read into the Act and some arguable error could be found in an offering prospectus: "Would I have purchased this particular security at the time it was offered if I had known the correct facts?" Apart from the human temptation for the plaintiff to answer this question in a self-serving fashion, the offeror

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[1] It is argued that the language "in connection with" justifies extending § 10 (b) to include offers which necessarily precede a purchase or sale. The short answer is that the statute requires a purchase or a sale of a security, and no offer was made to respondent in connection with either. Its complaint rests upon the *absence* of a sale to or purchase by it.

of the securities—defendant in the suit—is severely handicapped in challenging the predictable testimony.[2] The subjective issues would be even more speculative in the class actions that inevitably would follow if we held that offers to sell securities are covered by § 10 (b) and Rule 10b–5.

In this case respondent was clearly identifiable as an offeree, as here the shares were offered to designated persons.[3] In the more customary public sale of securities, identification of those who in fact were bona fide offerees would present severe problems of proof. The 1933 Act requires that offers to sell registered securities be made by means of an effective prospectus. § 5 (b), 15 U. S. C. § 77e (b). Issues are usually marketed through underwriters and dealers, often including scores of investment banking and brokerage firms across the country. Copies of the prospectus may be widely distributed through the dealer group, and then passed hand to hand among countless persons whose identities cannot be known. If § 10 (b) were extended to embrace offers to sell, the number of persons claiming to have been

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[2] Proving, after the fact, what "one would have done" encompasses a number of conjectural as well as subjective issues: would the offeree have bought at all; how many shares would he have bought; how long would he have held the shares; were there other "buys" on the market at the time that may have been more attractive even had the offeree known the facts; did he in fact use his available funds (if any) more advantageously by purchasing something else?

[3] It is argued that the special facts of this case justify extending the benefit of § 10 (b) to this respondent, even if the statute ordinarily requires a purchase or a sale. But this resolution also would require judicial extension of the terms of the statute. The mere fact that securities are offered to a limited class of offerees may eliminate some of the problems of proof but it does not avoid the fatal objection that no offer of securities, absent a purchase or sale, is covered by the statute.

offerees could be legion with respect to any security that subsequently proved to be a rewarding investment.

We are entitled to assume that the Congress, in enacting § 10 (b) and in subsequently declining to extend it, took into account these and similar considerations. The courts already have inferred a private cause of action that was not authorized by the legislation. In doing this, however, it was unnecessary to rewrite the precise language of § 10 (b) and Rule 10b–5. This is exactly what respondent—joined, surprisingly, by the SEC—sought in this case.[4] If such a far-reaching change is to

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[4] It is more than curious that the SEC should seek this change in the 1934 Act by judicial action. The stated purpose of the 1933 Act was "[t]o provide full and fair disclosure of the character of securities sold in interstate and foreign commerce . . . ." See preamble to Act, 48 Stat. 74. The evil addressed was the tendency of the seller to exaggerate, to "puff," and sometimes fraudulently to overstate the prospects and earning capabilities of the issuing corporation. The decade of the 1920's was marked by financings in which the buying public was oversold, and often misled, by the buoyant optimism of issuers and underwriters. The 1933 Act was intended to compel moderation and caution in prospectuses, and this is precisely the way that Act has been administered by the SEC for more than 40 years. Precise factual accuracy with respect to a corporate enterprise is frequently impossible, except with respect to hard facts. The outcome of pending litigation, the effect of relatively new legislation, the possible enactment of adverse legislation, the cost of projected construction or of entering new markets, the expenditures needed to meet changing environmental regulations, the likelihood and effect of new competition or of new technology, and many similar matters of potential relevancy must be addressed in registration statements and prospectuses. In administering the 1933 Act, the SEC traditionally and consistently has encouraged and often required offerors to take conservative postures in prospectuses, especially with respect to judgmental and possibly unfavorable matters. If a different philosophy now were to be read into the 1934 Act, inviting litigation for arguably misleading understatement as well as for overstatement of the issuer's prospects, the hazard of

be made, with unpredictable consequences for the process of raising capital so necessary to our economic well-being, it is a matter for the Congress, not the courts.

II

MR. JUSTICE BLACKMUN's dissent charges the Court with "a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public." Our task in this case is to construe a statute. In my view, the answer is plainly compelled by the language as well as the legislative history of the 1933 and 1934 Acts. But even if the language is not "plain" to all, I would have thought none could doubt that the statute can be read fairly to support the result the Court reaches. Indeed, if one takes a different view—and imputes callousness to all who disagree—he must attribute a lack of legal and social perception to the scores of federal judges who have followed *Birnbaum* for two decades.

The dissenting opinion also charges the Court with paying "no heed to the unremedied wrong" arising from the type of "fraud" that may result from reaffirmance of the *Birnbaum* rule. If an issue of statutory construction is to be decided on the basis of assuring a *federal* remedy—in addition to state remedies—for every perceived fraud, at least we should strike a balance between the opportunities for fraud presented by the contending views. It may well be conceded that *Birnbaum* does allow some fraud to go unremedied under the federal securities Acts. But the construction advocated by the dissent could result in wider opportunities for fraud. As the Court's opinion makes plain, abandoning the *Birnbaum* construction in favor of the rule urged by the dissent would invite any person who failed to purchase a

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"going to market"—already not inconsequential—would be immeasurably increased.

newly offered security that subsequently enjoyed substantial market appreciation to file a claim alleging that the offering prospectus understated the company's potential. The number of possible plaintiffs with respect to a public offering would be virtually unlimited. As noted above (at 758 n. 2), an honest offeror could be confronted with subjective claims by plaintiffs who had neither purchased its securities nor seriously considered the investment. It frequently would be impossible to refute a plaintiff's assertion that he relied on the prospectus, or even that he made a decision not to buy the offered securities. A rule allowing this type of open-ended litigation would itself be an invitation to fraud.[5]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Today the Court graves into stone *Birnbaum*'s[1] arbitrary principle of standing. For this task the Court, unfortunately, chooses to utilize three blunt chisels: (1) reliance on the legislative history of the 1933 and

[5] The dissent also charges that we are callous toward the "investing public"—a term it does not define. It would have been more accurate, perhaps, to have spoken of the noninvesting public, because the Court's decision does not abandon the investing public. The great majority of registered issues of securities are offered by established corporations that have shares outstanding and held by members of the investing public. The types of suits that the dissent would encourage could result in large damage claims, costly litigation, generous settlements to avoid such cost, and often—where the litigation runs its course—in large verdicts. The shareholders of the defendant corporations—the "investing public"—would ultimately bear the burden of this litigation, including the fraudulent suits that would not be screened out by the dissent's bare requirement of a "logical nexus between the alleged fraud and the sale or purchase of a security."

[1] *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (CA2), cert. denied, 343 U. S. 956 (1952).

1934 Securities Acts, conceded as inconclusive in this particular context; (2) acceptance as precedent of two decades of lower court decisions following a doctrine, never before examined here, that was pronounced by a justifiably esteemed panel of that Court of Appeals regarded as the "Mother Court" in this area of the law,[2] but under entirely different circumstances; and (3) resort to utter pragmaticality and a conjectural assertion of "policy considerations" deemed to arise in distinguishing the meritorious Rule 10b–5 suit from the meretricious one. In so doing, the Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping, it seems to me, with our own traditions and the intent of the securities laws. See *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 463 (1969); *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967); *SEC* v. *Capital Gains Bureau*, 375 U. S. 180, 195 (1963).

The plaintiff's complaint—and that is all that is before us now—raises disturbing claims of fraud. It alleges that the directors of "New Blue Chip" and the majority shareholders of "Old Blue Chip" engaged in a deceptive and manipulative scheme designed to subvert the intent of the 1967 antitrust consent decree and to enhance the value of their own shares in a subsequent offering. Although the complaint is too long to reproduce here, see App. 4–22, the plaintiff, in short, contends that the much-negotiated plan of reorganization of Old Blue

[2] Just this Term, however, we did not view with such tender regard another decision by the very same panel. See *United States* v. *Feola*, 420 U. S. 671 (1975), and its treatment of an analogy advanced in *United States* v. *Crimmins*, 123 F. 2d 271 (CA2 1941).

Chip, pursuant to the decree and approved by the District Court, was intended to compensate former retailer-users of Blue Chip stamps for damages suffered as a result of the antitrust violations. Accordingly, the majority shareholders were to be divested of 55% of their interest; Old Blue Chip was to be merged into a new company; and 55% of the common shares of the new company were to be offered to the former users on a pro rata basis, determined by the quantity of stamps issued to each of these nonshareholding users during a designated period. Some 621,000 shares were thus to be offered in units, each consisting of three shares of common and a $100 debenture, in return for $101 cash.

It is the plaintiff's pleaded position that this offer to the former users was intended by the antitrust court and the Government to be a "bargain," since the then reasonable market value of each unit was actually $315. The plaintiff alleged, however, that the offering shareholders had no intention of complying in good faith with the terms of the consent decree and of permitting the former users of Blue Chip stamps to obtain the bargain offering. Rather, they conspired to dissuade the offerees from purchasing the units by including substantially misleading and negative information in the prospectus under the heading "Items of Special Interest." The prospectus contained the following statements, allegedly false and allegedly made to deter the plaintiff and its class from purchasing the units: (1) that "[n]et income for the current fiscal year will be adversely affected by payments aggregating $8,486,000 made since March 2, 1968 in settlement of claims" against New Blue Chip; (2) that net income "would be adversely affected by a substantial decrease in the use of the Company's trading stamp service"; (3) that net income "would be adversely affected by a sale of one-third of the Company's trading stamp

business in California"; (4) that "Claims or Causes of Action (as defined) against the Company, including prayers for treble damages, now aggregate approximately $29,000,000"; and (5) that, based upon "statistical evaluations," "the Company presently estimates that 97.5% of all stamps issued will ultimately be redeemed." App. 56, 66.

Plaintiff alleged that these negative statements were known, or should have been known, by the defendants to be false since, for example, the $29,000,000 in purported legal claims were settled for less than $1,000,000 only three months later, and, as a historical fact, less than 90% of all trading stamps are redeemed. Importantly, when the defendants offered their own shares for sale to the public a year later, the prospectus issued at that time made no reference to these factors even though, to the extent that they were relevant on the date of the first prospectus, one year earlier, they would have been equally relevant on the date of the second. As a result of the defendants' negative statements, plaintiff claims that it and its class were dissuaded from exercising their option to purchase Blue Chip shares and that they were damaged accordingly.

From a reading of the complaint in relation to the language of § 10 (b) of the 1934 Act and of Rule 10b–5, it is manifest that plaintiff has alleged the use of a deceptive scheme "in connection with the purchase or sale of any security." To my mind, the word "sale" ordinarily and naturally may be understood to mean, not only a single, individualized act transferring property from one party to another, but also the generalized event of public disposal of property through advertisement, auction, or some other market mechanism. Here, there is an obvious, indeed a court-ordered, "sale" of securities in the special offering of New Blue Chip shares and debentures to former users. Yet the Court denies this

plaintiff the right to maintain a suit under Rule 10b–5 because it does not fit into the mechanistic categories of either "purchaser" or "seller." This, surely, is an anomaly, for the very purpose of the alleged scheme was to inhibit this plaintiff from ever acquiring the status of "purchaser." Faced with this abnormal divergence from the usual pattern of securities frauds, the Court pays no heed to the unremedied wrong or to the portmanteau nature of § 10 (b).

The broad purpose and scope of the Securities Exchange Act of 1934 are manifest. Senator Fletcher, Chairman of the Senate Committee on Banking and Currency, in introducing S. 2693, the bill that became the 1934 Act, reviewed the general purposes of the legislation:

> "Manipulators who have in the past had a comparatively free hand to befuddle and fool the public and to extract from the public millions of dollars through stock-exchange operations are to be curbed and deprived of the opportunity to grow fat on the savings of the average man and woman of America. Under this bill the securities exchanges will not only have the appearance of an open market place for investors but will be truly open to them, free from the hectic operations and dangerous practices which in the past have enabled a handful of men to operate with stacked cards against the general body of the outside investors. For example, besides forbidding fraudulent practices and unwholesome manipulations by professional market operators, the bill seeks to deprive corporate directors, corporate officers, and other corporate insiders of the opportunity to play the stocks of their companies against the interests of the stockholders of their companies." 78 Cong. Rec. 2271 (1934).

The Senator went on to describe the function of each of the many provisions of the bill, including § 9 (c) which, without significant alteration, became § 10 (b) of the Act. He said, as to this section, in terms that surely are broad:

> "The Commission is also given power to forbid any other devices in connection with security transactions which it finds detrimental to the public interest or to the proper protection of investors." *Ibid.*

Similarly, the broad scope of the identical provision in the House version of the bill was emphasized by one of the principal draftsmen, in testimony before the House Committee on Interstate and Foreign Commerce. Summing up § 9 (c), he stated:

> "Subsection (c) says, 'Thou shalt not devise any other cunning devices.'
>
> . . . . .
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> ". . . Of course subsection (c) is a catch-all clause to prevent manipulative devices[.] I do not think there is any objection to that kind of a clause. The Commission should have the authority to deal with new manipulative devices." Testimony of Thomas G. Corcoran, Hearing on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 115 (1934).

In adopting Rule 10b–5 in 1942, the Securities and Exchange Commission issued a press release stating: "The new rule closes a loophole in the protections against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." SEC Release No. 3230 (May 21, 1942). To say specifically that certain types of fraud are within Rule 10b–5, of course, is not to say that others are necessarily excluded. That this

is so is confirmed by the apparently casual origins of the Rule, as recalled by a former SEC staff attorney in remarks made at a conference on federal securities laws several years ago:

> "It was one day in the year 1943, I believe. I was sitting in my office in the S. E. C. building in Philadelphia and I received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, 'I have just been on the telephone with Paul Rowen,' who was then the S. E. C. Regional Administrator in Boston, 'and he has told me about the president of some company in Boston who is going around buying up the stock of his company from his own shareholders at $4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be $2.00 a share for this coming year. Is there anything we can do about it?' So he came upstairs and I called in my secretary and I looked at Section 10 (b) and I looked at Section 17, and I put them together, and the only discussion we had there was where 'in connection with the purchase or sale' should be, and we decided it should be at the end.
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> "We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the rule and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, 'Well,' he said, 'we are against fraud, aren't we?' That is how it happened." Remarks of Milton Freeman, Conference on Codification of the Federal Securities Laws, 22 Bus. Law. 793, 922 (1967).

The question under both Rule 10b–5 and its parent statute, § 10 (b), is whether fraud was employed—and the language is critical—by "any person . . . in connection with the purchase or sale of any security." On the allegations here, the nexus between the asserted fraud and the conducting of a "sale" is obvious and inescapable, and no more should be required to sustain the plaintiff's complaint against a motion to dismiss.

The fact situation in *Birnbaum* itself, of course, is far removed from that now before the Court, for there the fundament of the complaint was that the controlling shareholder had misrepresented the circumstances of an attractive merger offer and then, after rejecting the merger, had sold his controlling shares at a price double their then market value to a corporation formed by 10 manufacturers who wished control of a captive source's supply when there was a market shortage. The Second Circuit turned aside an effort by small shareholders to bring this claim of breach of fiduciary duty under Rule 10b–5 by concluding that the Rule and § 10 (b) protected only those who had bought or had sold securities.

Many cases applying the *Birnbaum* doctrine and continuing critical comments from the academic world [3] fol-

[3] See, *e. g.*, Lowenfels, The Demise of the *Birnbaum* Doctrine: A New Era for Rule 10b–5, 54 Va. L. Rev. 268 (1968); Boone & McGowan, Standing to Sue Under SEC Rule 10b–5, 49 Tex. L. Rev. 617 (1971); Whitaker, The *Birnbaum* Doctrine: An Assessment, 23 Ala. L. Rev. 543 (1971); Ruder, Current Developments in the Federal Law of Corporate Fiduciary Relations—Standing to Sue Under Rule 10b–5, 26 Bus. Law. 1289 (1971); Fuller, Another Demise of the Birnbaum Doctrine: "Tolls the Knell of Parting Day?", 25 Miami L. Rev. 131 (1970); Comment, Dumping *Birnbaum* to Force Analysis of the Standing Requirement under Rule 10b–5, 6 Loyola L. J. 230 (1975); Note, Standing to Sue in 10b–5 Actions, 49 Notre Dame Law. 1131 (1974); Comment, 10b–5 Standing Under Birnbaum: The Case of the Missing Remedy, 24 Hastings L. J. 1007 (1973); Comment, The Purchaser-Seller Requirement of

lowed in its wake, but until today the Court remained serenely above the fray.

To support its decision to adopt the *Birnbaum* doctrine, the Court points to the "longstanding acceptance by the courts" and to "Congress' failure to reject *Birnbaum*'s reasonable interpretation of the wording of § 10 (b)." *Ante*, at 733. In addition, the Court purports to find support in "evidence from the texts of the 1933 and 1934 Acts," although it concedes this to be "not conclusive." *Ibid.* But the greater portion of the Court's opinion is devoted to its discussion of the "danger of vexatiousness," *ante*, at 739, that accompanies litigation under Rule 10b–5 and that is said to be "different in degree and in kind from that which accompanies litigation in general." *Ibid.* It speaks of harm from the "very pendency of the lawsuit," *ante*, at 740, something like the recognized dilemma of the physician sued for malpractice; of the "disruption of normal business activities which may accompany a lawsuit," *ante*, at 743; and of "proof . . . which depend[s] almost entirely on oral testimony," *ibid.*, as if all these were unknown to lawsuits taking place in America's courthouses every day. In turning to, and being influenced by, these "policy considerations," *ante*, at 737, or these "considerations of policy," *ante*, at 749, the Court, in my view, unfortunately mires itself in speculation and conjecture

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Rule 10b–5 Reevaluated, 44 U. Colo. L. Rev. 151 (1972); Comment, Inroads on the Necessity for a Consummated Purchase or Sale Under Rule 10b–5, 1969 Duke L. J. 349; Comment, The Decline of the Purchaser-Seller Requirement of Rule 10b–5, 14 Villanova L. Rev. 499 (1969); Comment, The Purchaser-Seller Limitation to SEC Rule 10b–5, 53 Cornell L. Rev. 684 (1968); Comment, The Purchaser-Seller Rule: An Archaic Tool for Determining Standing Under Rule 10b–5, 56 Geo. L. J. 1177 (1968). See Note, Limiting the Plaintiff Class: Rule 10b–5 and the Federal Securities Code, 72 Mich. L. Rev. 1398, 1412 (1974).

not usually seen in its opinions. In order to support an interpretation that obviously narrows a provision of the securities laws designed to be a "catch-all," the Court takes alarm at the "practical difficulties," *ante*, at 754, 755, that would follow the removal of *Birnbaum*'s barrier.

Certainly, this Court must be aware of the realities of life, but it is unwarranted for the Court to take a form of attenuated judicial notice of the motivations that defense counsel may have in settling a case, or of the difficulties that a plaintiff may have in proving his claim.

Perhaps it is true that more cases that come within the *Birnbaum* doctrine can be properly proved than those that fall outside it. But this is no reason for denying standing to sue to plaintiffs, such as the one in this case, who allegedly are injured by novel forms of manipulation. We should be wary about heeding the seductive call of expediency and about substituting convenience and ease of processing for the more difficult task of separating the genuine claim from the unfounded one.

Instead of the artificiality of *Birnbaum*, the essential test of a valid Rule 10b–5 claim, it seems to me, must be the showing of a logical nexus between the alleged fraud and the sale or purchase of a security. It is inconceivable that Congress could have intended a broad-ranging antifraud provision, such as § 10 (b), and, at the same time, have intended to impose, or be deemed to welcome, a mechanical overtone and requirement such as the *Birnbaum* doctrine. The facts of this case, if proved and accepted by the factfinder, surely are within the conduct that Congress intended to ban. Whether this particular plaintiff, or any plaintiff, will be able eventually to carry the burdens of proving fraud and of proving reliance and damage—that is, causality and injury—is a matter that should not be left to specula-

tions of "policy" of the kind now advanced in this forum so far removed from witnesses and evidence.

Finally, I am uneasy about the type of precedent the present decision establishes. Policy considerations can be applied and utilized in like fashion in other situations. The acceptance of this decisional route in this case may well come back to haunt us elsewhere before long. I would decide the case to fulfill the broad purpose that the language of the statutes and the legislative history dictate, and I would avoid the Court's pragmatic solution resting upon a 20-odd-year-old, severely criticized doctrine enunciated for a factually distinct situation.

In short, I would abandon the *Birnbaum* doctrine as a rule of decision in favor of a more general test of nexus, just as the Seventh Circuit did in *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654, 661 (1973), cert. denied, 416 U. S. 960 (1974). I would not worry about any imagined inability of our federal trial and appellate courts to control the flowering of the types of cases that the Court fears might result. Nor would I yet be disturbed about dire consequences that a basically pessimistic attitude foresees if the *Birnbaum* doctrine were allowed quietly to expire. Sensible standards of proof and of demonstrable damages would evolve and serve to protect the worthy and shut out the frivolous.

EDWARDS, GOVERNOR OF LOUISIANA, ET AL. *v.* HEALY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 73-759. Argued October 16, 1974—Decided June 9, 1975

Changes in state constitutional, statutory, and other applicable rules, raise question as to whether this case has become moot.

363 F. Supp. 1110, vacated and remanded.

Kendall L. Vick, Assistant Attorney General of Louisiana, argued the cause for appellants. On the brief were *William J. Guste, Jr.,* Attorney General, and *Warren E. Mouledoux,* First Assistant Attorney General.

Ruth Bader Ginsburg argued the cause for appellees. With her on the brief was *Melvin L. Wulf.**

PER CURIAM.

The judgment of the District Court for the Eastern District of Louisiana is vacated and the case is remanded to that court to consider whether in the light of recent changes in the state constitutional, statutory, and other rules applicable to this case the cause has become moot.

MR. JUSTICE DOUGLAS took no part in the decision of this case.

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*Briefs of *amici curiae* urging affirmance were filed by *Chesterfield Smith* and *Marguerite Rawalt* for the American Bar Assn., and by *Nancy Stearns* for the Center for Constitutional Rights.

Syllabus

GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-70. Argued March 25, 1975—Decided June 16, 1975

Petitioners, husband and wife, contracted to buy a home in Fairfax County, Va., and the lender who financed the purchase required them to obtain title insurance, which necessitated a title examination that could be performed legally only by a member of respondent Virginia State Bar. Petitioners unsuccessfully tried to find a lawyer who would examine the title for less than the fee prescribed in a minimum-fee schedule published by respondent Fairfax County Bar Association and enforced by respondent Virginia State Bar. Petitioners then brought this class action against respondents, seeking injunctive relief and damages, and alleging that the minimum-fee schedule and its enforcement mechanism, as applied to fees for legal services relating to residential real estate transactions, constitute price fixing in violation of § 1 of the Sherman Act. Although holding that the State Bar was exempt from the Sherman Act, the District Court granted judgment against the County Bar Association and enjoined the publication of the fee schedule. The Court of Appeals reversed, holding not only that the State Bar's actions were immune from liability as "state action," *Parker* v. *Brown*, 317 U. S. 341, but also that the County Bar Association was immune because the practice of law, as a "learned profession," is not "trade or commerce" under the Sherman Act; and that, in any event, respondents' activities did not have sufficient effect on interstate commerce to support Sherman Act jurisdiction. *Held:* The minimum-fee schedule, as published by the County Bar Association and enforced by the State Bar, violates § 1 of the Sherman Act. Pp. 780–793.

(a) The schedule and its enforcement mechanism constitute price fixing since the record shows that the schedule, rather than being purely advisory, operated as a fixed, rigid price floor. The fee schedule was enforced through the prospect of professional discipline by the State Bar, by reason of attorneys' desire to comply with announced professional norms, and by the assurance that other lawyers would not compete by underbidding. Pp. 781–783.

(b) Since a significant amount of funds furnished for financing the purchase of homes in Fairfax County comes from outside the State, and since a title examination is an integral part of such interstate transactions, interstate commerce is sufficiently affected for Sherman Act purposes notwithstanding that there is no showing that prospective purchasers were discouraged from buying homes in Fairfax County by the challenged activities, and no showing that the fee schedule resulted in raising fees. Pp. 783–785.

(c) Congress did not intend any sweeping "learned profession" exclusion from the Sherman Act; a title examination is a service, and the exchange of such a service for money is "commerce" in the common usage of that term. Pp. 785–788.

(d) Respondents' activities are not exempt from the Sherman Act as "state action" within the meaning of *Parker* v. *Brown*, *supra*. Neither the Virginia Supreme Court nor any Virginia statute required such activities, and, although the State Bar has the power to issue ethical opinions, it does not appear that the Supreme Court approves them. It is not enough that the anticompetitive conduct is "prompted" by state action; to be exempt, such conduct must be compelled by direction of the State acting as a sovereign. Here the State Bar, by providing that deviation from the minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity and hence cannot claim it is beyond the Sherman Act's reach. Pp. 788–792.

497 F. 2d 1, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined except POWELL, J., who took no part in the consideration or decision of the case.

Alan B. Morrison argued the cause and filed briefs for petitioners.

Andrew P. Miller, Attorney General of Virginia, argued the cause for respondent Virginia State Bar. With him on the brief were *Anthony F. Troy*, Deputy Attorney General, and *Stuart H. Dunn*, Assistant Attorney General. *Lewis T. Booker* argued the cause for respondent Fairfax County Bar Assn. With him on the brief was *John H. Shenefield.*

Solicitor General Bork argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Kauper, Gerald P. Norton,* and *Howard E. Shapiro.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. The Court of Appeals held that, although the fee schedule and enforcement mechanism substantially restrained competition among lawyers, publication of the schedule by the County Bar was outside the scope of the Act because the practice of law is not "trade or commerce," and enforcement of the schedule by the State Bar was exempt from the Sherman Act as state action as defined in *Parker* v. *Brown,* 317 U. S. 341 (1943).

I

In 1971 petitioners, husband and wife, contracted to buy a home in Fairfax County, Va. The financing agency required them to secure title insurance; this required a title examination, and only a member of the Virginia State Bar could legally perform that service.[1]

**Eleanor M. Fox* filed a brief for the Association of the Bar of the City of New York as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *James D. Fellers* and *H. Blair White* for the American Bar Assn.; by *Richard C. McFarlain* for the National Organization of Bar Counsel; by *Leroy Jeffers* for the State Bar of Texas; by *Warren H. Resh* for the State Bar of Wisconsin; by *E. Robert Wallach* and *Walter J. Robinson* for the Bar Association of San Francisco; and by *Owen Rall* and *Peter M. Sfikas* for the American Dental Assn.

[1] Unauthorized Practice of Law, Opinion No. 17, Aug. 5, 1942, Virginia State Bar—Opinions 239 (1965).

Petitioners therefore contacted a lawyer who quoted them the precise fee suggested in a minimum-fee schedule published by respondent Fairfax County Bar Association; the lawyer told them that it was his policy to keep his charges in line with the minimum-fee schedule which provided for a fee of 1% of the value of the property involved. Petitioners then tried to find a lawyer who would examine the title for less than the fee fixed by the schedule. They sent letters to 36 other Fairfax County lawyers requesting their fees. Nineteen replied, and none indicated that he would charge less than the rate fixed by the schedule; several stated that they knew of no attorney who would do so.

The fee schedule the lawyers referred to is a list of recommended minimum prices for common legal services. Respondent Fairfax County Bar Association published the fee schedule although, as a purely voluntary association of attorneys, the County Bar has no formal power to enforce it. Enforcement has been provided by respondent Virginia State Bar which is the administrative agency [2] through which the Virginia Supreme Court regulates the practice of law in that State; membership in the State Bar is required in order to practice in Virginia.[3] Although the State Bar has never taken formal disciplinary action to compel adherence to any fee sched-

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[2] Virginia Code Ann. § 54–49 (1972) provides:

"The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[3] *Ibid.*

ule, it has published reports [4] condoning fee schedules, and has issued two ethical opinions [5] indicating that fee schedules cannot be ignored. The most recent opinion states that "evidence that an attorney *habitually* charges

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[4] In 1962 the State Bar published a minimum-fee-schedule report that listed a series of fees and stated that they "represent the considered judgment of the Committee [on Economics of Law Practice] as to [a] fair minimum fee in each instance." The report stated, however, that the fees were not mandatory, and it recommended only that the State Bar *consider* adopting such a schedule. Nevertheless, shortly thereafter the County Bar adopted its own minimum-fee schedule that purported to be "a conscientious effort to show lawyers in their true perspective of dignity, training and integrity." The suggested fees for title examination were virtually identical to those in the State Bar report. In accord with Opinion 98 of the State Bar Committee on Legal Ethics the schedule stated that, although there is an ethical duty to charge a lower fee in a deserving case, if a lawyer

"'purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services . . . [in order to] increase his business with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another.'" App. 30.

In 1969 the State Bar published a second fee-schedule report that, as it candidly stated, "reflect[ed] a general scaling up of fees for legal services." The report again stated that no local bar association was bound by its recommendations; however, respondent County Bar again quickly moved to publish an updated minimum-fee schedule, and generally to raise fees. The new schedule stated that the fees were not mandatory, but tempered that by referring again to Opinion 98. This time the schedule also stated that lawyers should feel free to charge *more* than the recommended fees; and to avoid condemnation of higher fees charged by some lawyers, it cautioned County Bar members that "to . . . publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of solicitation . . . ."

[5] Virginia State Bar Committee on Legal Ethics, Opinion No. 98, June 1, 1960; Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971.

less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct . . . ." [6]

Because petitioners could not find a lawyer willing to charge a fee lower than the schedule dictated, they had their title examined by the lawyer they had first contacted. They then brought this class action against the State Bar and the County Bar [7] alleging that the operation of the minimum-fee schedule, as applied to fees for legal services relating to residential real estate transactions, constitutes price fixing in violation of § 1 of the Sherman Act. Petitioners sought both injunctive relief and damages.

After a trial solely on the issue of liability the District Court held that the minimum-fee schedule violated the Sherman Act.[8] 355 F. Supp. 491 (ED Va. 1973). The

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[6] *Ibid.* The parties stipulated that these opinions are a substantial influencing factor in lawyers' adherence to the fee schedules. One reason for this may be because the State Bar is required by statute to "investigat[e] and report . . . the violation of . . . rules and regulations as are adopted by the [Virginia Supreme Court] to a court of competent jurisdiction for such proceedings as may be necessary . . . ." Va. Code Ann. § 54–49 (1972). Therefore any lawyer who contemplated ignoring the fee schedule must have been aware that professional sanctions were possible, and that an enforcement mechanism existed to administer them.

[7] Two additional county bar associations were originally named as defendants but they agreed to a consent judgment under which they were directed to cancel their existing fee schedules, and were enjoined from adopting, publishing, or distributing any future schedules of minimum or suggested fees. Damage claims against these associations were then dismissed with prejudice.

[8] The court was satisfied that interstate commerce was sufficiently affected to sustain jurisdiction under the Sherman Act because a significant portion of the funds and insurance involved in the purchase of homes in Fairfax County comes from outside the State of Virginia. 355 F. Supp 491, 497 (ED Va. 1973).

court viewed the fee-schedule system as a significant reason for petitioners' failure to obtain legal services for less than the minimum fee, and it rejected the County Bar's contention that as a "learned profession" the practice of law is exempt from the Sherman Act.

Both respondents argued that their actions were also exempt from the Sherman Act as state action. *Parker* v. *Brown, supra.* The District Court agreed that the Virginia State Bar was exempt under that doctrine because it is an administrative agency of the Virginia Supreme Court, and more important, because its "minor role in this matter . . . derived from the judicial and 'legislative command of the State and was not intended to operate or become effective without that command.'" The County Bar, on the other hand, is a private organization and was under no compulsion to adopt the fee schedule recommended by the State Bar. Since the County Bar chose its own course of conduct the District Court held that the antitrust laws "remain in full force and effect as to it." The court enjoined the fee schedule, 15 U. S. C. § 26, and set the case down for trial to ascertain damages. 15 U. S. C. § 15.

The Court of Appeals reversed as to liability. 497 F. 2d 1 (CA4 1974). Despite its conclusion that it "is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County," *id.*, at 13, the Court of Appeals held the State Bar immune under *Parker* v. *Brown, supra,* and held the County Bar immune because the practice of law is not "trade or commerce" under the Sherman Act. There has long been judicial recognition of a limited exclusion of "learned professions" from the scope of the antitrust laws, the court said; that exclusion is based upon the special form

of regulation imposed upon the professions by the States, and the incompatibility of certain competitive practices with such professional regulation. It concluded that the promulgation of a minimum-fee schedule is one of "those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws." The accord reached by that court was to hold the practice of law exempt from the antitrust laws.

Alternatively, the Court of Appeals held that respondents' activities did not have sufficient effect on interstate commerce to support Sherman Act jurisdiction. Petitioners had argued that the fee schedule restrained the business of financing and insuring home mortgages by inflating a component part of the total cost of housing, but the court concluded that a title examination is generally a local service, and even where it is part of a transaction which crosses state lines its effect on commerce is only "incidental," and does not justify federal regulation.

We granted certiorari, 419 U. S. 963 (1974), and are thus confronted for the first time with the question of whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of real estate.

II

Our inquiry can be divided into four steps: did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? If so, are the activities exempt from the Sherman Act because they involve a "learned profession?" If not, are the activities "state action" within the meaning of *Parker* v. *Brown*, 317 U. S. 341 (1943), and therefore exempt from the Sherman Act?

A

The County Bar argues that because the fee schedule is merely advisory, the schedule and its enforcement mechanism do not constitute price fixing. Its purpose, the argument continues, is only to provide legitimate information to aid member lawyers in complying with Virginia professional regulations. Moreover, the County Bar contends that in practice the schedule has not had the effect of producing fixed fees. The facts found by the trier belie these contentions, and nothing in the record suggests these findings lack support.

A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an actual restraint on trade, would present us with a different question, *e. g., American Column Co.* v. *United States,* 257 U. S. 377 (1921); *Maple Flooring Assn.* v. *United States,* 268 U. S. 563, 580 (1925). But see *United States* v. *National Assn. of Real Estate Boards,* 339 U. S. 485, 488–489, 495 (1950). The record here, however, reveals a situation quite different from what would occur under a purely advisory fee schedule. Here a fixed, rigid price floor arose from respondents' activities: every lawyer who responded to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee. The price information disseminated did not concern past standards, cf. *Cement Mfrs. Protective Assn.* v. *United States,* 268 U. S. 588 (1925), but rather minimum fees to be charged in future transactions, and those minimum rates were increased over time. The fee schedule was enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms, see generally *American Column Co., supra,* at 411;

the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding. This is not merely a case of an agreement that may be inferred from an exchange of price information, *United States* v. *Container Corp.*, 393 U. S. 333, 337 (1969), for here a naked agreement was clearly shown, and the effect on prices is plain.[9] *Id.*, at 339 (Fortas, J., concurring).

Moreover, in terms of restraining competition and harming consumers, like petitioners the price-fixing activities found here are unusually damaging. A title examination is indispensable in the process of financing a real estate purchase, and since only an attorney licensed to practice in Virginia may legally examine a title, see n. 1, *supra*, consumers could not turn to alternative sources for the necessary service. All attorneys, of course, were practicing under the constraint of the fee schedule. See generally *United States* v. *Container Corp.*, *supra*, at 337. The County Bar makes much of the fact that it is a voluntary organization; however, the ethical opinions issued by the State Bar provide that any lawyer, whether or not a member of his county bar associ-

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[9] The Court of Appeals accurately depicted the situation:

"[I]t is clear from the record that all or nearly all of the [County Bar] members charged fees equal to or exceeding the fees set forth in the schedule for title examinations and other services involving real estate." 497 F. 2d 1, 12 (CA4 1974).

" 'A significant reason for the inability of [petitioners] to obtain legal services . . . for less than the fee set forth in the Minimum Fee Schedule . . . was the operation of the minimum fee schedule system.' " *Id.*, at 4.

"It is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County." *Id.*, at 13.

ation, may be disciplined for "*habitually* charg[ing] less than the suggested minimum fee schedule adopted by his local bar Association . . . ." See *supra*, at 777–778, and n. 4. These factors coalesced to create a pricing system that consumers could not realistically escape. On this record respondents' activities constitute a classic illustration of price fixing.

B

The County Bar argues, as the Court of Appeals held, that any effect on interstate commerce caused by the fee schedule's restraint on legal services was incidental and remote. In its view the legal services, which are performed wholly intrastate, are essentially local in nature and therefore a restraint with respect to them can never substantially affect interstate commerce. Further, the County Bar maintains, there was no showing here that the fee schedule and its enforcement mechanism increased fees, and that even if they did there was no showing that such an increase deterred any prospective homeowner from buying in Fairfax County.

These arguments misconceive the nature of the transactions at issue and the place legal services play in those transactions. As the District Court found,[10] "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia," and "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia." Thus in this class action the transactions which create the need for the particular legal

[10] The Court of Appeals did not disturb the District Court's findings of fact. It simply disagreed on the conclusions of law drawn therefrom.

services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense,[11] title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, "as a condition of making the loan, that the title to the property involved be examined . . . ." [12] Thus a title examination is an integral part of an interstate transaction [13] and this Court has long held that

> "there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states."

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[11] It is in a practical sense that we must view an effect on interstate commerce, *Swift & Co.* v. *United States*, 196 U. S. 375, 398 (1905); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 233 (1948).

[12] 355 F. Supp., at 494.

[13] The County Bar relies on *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947), to support its argument that the "essentially local" legal services at issue here are beyond the Sherman Act. There we held, *inter alia*, that intrastate taxi trips that occurred at the start and finish of interstate rail travel were "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." *Id.*, at 230. The ride to the railway station, we said, "[f]rom the standpoints of time and continuity . . . may be quite distinct and separate from the interstate journey." *Id.*, at 232. Here, on the contrary, the legal services are coincidental with interstate real estate transactions in terms of time, and, more important, in terms of continuity they are essential. Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In *Yellow Cab* we held that such a trip was a part of the stream of commerce. *Id.*, at 228–229.

United States v. *Frankfort Distilleries*, 324 U. S. 293, 297 (1945).

See *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 228–229 (1947).

Given the substantial volume of commerce involved,[14] and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected. See *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45–46 (1904); *United States* v. *Women's Sportswear Assn.*, 336 U. S. 460, 464–465 (1949).

The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. *E. g.*, *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 310 (1956). Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus "deprive[d] purchasers or consumers of the advantages which they derive from free competition." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 501 (1940). See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that

[14] 355 F. Supp., at 497.

have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.

C

The County Bar argues that Congress never intended to include the learned professions within the terms "trade or commerce" in § 1 of the Sherman Act,[15] and therefore the sale of professional services is exempt from the Act. No explicit exemption or legislative history is provided to support this contention; rather, the existence of state regulation seems to be its primary basis. Also, the County Bar maintains that competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community.[16] That, indeed, is the classic basis traditionally

[15] The County Bar cites phrases in several cases that implied the practice of a learned profession is not "trade or commerce" under the antitrust laws. *E. g., Federal Club* v. *National League*, 259 U. S. 200, 209 (1922) ("a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State"); *FTC* v. *Raladam Co.*, 283 U. S. 643, 653 (1931) ("medical practitioners . . . follow a profession and not a trade . . ."); *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 436 (1932); *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 490 (1950). These citations are to passing references in cases concerned with other issues; and, more important, until the present case it is clear that we have not attempted to decide whether the practice of a learned profession falls within § 1 of the Sherman Act. In *National Assn. of Real Estate Boards*, we specifically stated that the question was still open, 339 U. S., at 492, as we had done earlier in *American Medical Assn.* v. *United States*, 317 U. S. 519, 528 (1943).

[16] The reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in respondent State Bar's 1962 Minimum Fee Schedule Report states:

"'The lawyers have slowly, but surely, been committing economic suicide as a profession.'" Virginia State Bar, Minimum Fee Schedule Report 1962, p. 3, App. 20.

advanced to distinguish professions from trades, businesses, and other occupations, but it loses some of its force when used to support the fee control activities involved here.

In arguing that learned professions are not "trade or commerce" the County Bar seeks a total exclusion from antitrust regulation. Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, *Associated Press* v. *United States,* 326 U. S. 1, 7 (1945), nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions. *United States* v. *National Assn. of Real Estate Boards,* 339 U. S., at 489. Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

The language of § 1 of the Sherman Act, of course, contains no exception. "Language more comprehensive is difficult to conceive." *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 553 (1944). And our cases have repeatedly established that there is a heavy presumption against implicit exemptions, *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 350–351 (1963); *California* v. *FPC,* 369 U. S. 482, 485 (1962). Indeed, our cases have specifically included the sale of services within § 1. *E. g., American Medical Assn.* v. *United States,* 317 U. S. 519 (1943); *Radovich* v. *National Football League,* 352 U. S. 445 (1957). Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is "commerce"

in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect,[17] and § 1 of the Sherman Act

> "[o]n its face . . . shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States* v. *South-Eastern Underwriters Assn.*, *supra*, at 553.

In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.

D

In *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court held that an anticompetitive marketing program which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. *Id.*, at 350–352; *Olsen* v. *Smith*, 195 U. S. 332, 344–345 (1904). Respondent State Bar and respondent County Bar both seek to avail themselves of this so-called state-action exemption.

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[17] The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may

Through its legislature Virginia has authorized its highest court to regulate the practice of law.[18] That court has adopted ethical codes which deal in part with fees, and far from exercising state power to authorize binding price fixing, explicitly directed lawyers not "to be controlled" by fee schedules.[19] The State Bar,

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require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

[18] Virginia Code Ann. § 54–48 (1972) provides:

"Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure.—The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law."

In addition, the Supreme Court of Virginia, has inherent power to regulate the practice of law in that State. *Button* v. *Day*, 204 Va. 547, 132 S. E. 2d 292 (1963). See *Lathrop* v. *Donohue*, 367 U. S. 820 (1961).

[19] In 1938 the Supreme Court of Virginia adopted Rules for the Integration of the Virginia State Bar, and Rule II, § 12, dealt with the procedure for setting fees. Among six factors that court directed to be considered in setting a fee were "the customary charges of the Bar for similar services." The court also directed that

"[i]n determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but *no lawyer should permit himself to be controlled* thereby or to follow it as his sole guide in determining the amount of his fee." Rules for Integration of the Virginia State Bar, 171 Va. xvii, xxiii. (Emphasis supplied.)

In 1970 the Virginia Supreme Court amended the 1938 rules in part, and adopted the Code of Professional Responsibility, effective Jan-

a state agency by law,[20] argues that in issuing fee schedule reports and ethical opinions dealing with fee schedules it was merely implementing the fee provisions of the ethical codes. The County Bar, although it is a voluntary association and not a state agency, claims that the ethical codes and the activities of the State Bar "prompted" it to issue fee schedules and thus its actions, too, are state action for Sherman Act purposes.

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker* v. *Brown*, 317 U. S., at 350–352; *Continental Co.* v. *Union Carbide*, 370 U. S. 690, 706–707 (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities.

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uary 1, 1971. 211 Va. 295 (1970). Certain of its provisions also dealt with the fee-setting procedure. In EC 2–18 lawyers were told again that fees vary according to many factors, but that "[s]uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees." 211 Va., at 302. In DR 2–106 (B), which detailed eight factors that should be considered in avoiding an excessive fee, one of the factors was "[t]he fee customarily charged in the locality for similar legal services." DR 2–106 (B)(3). 211 Va., at 313.

[20] See *supra*, at 776 n. 2.

Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.[21] Cf. *Gibson* v. *Berryhill*, 411 U. S. 564, 578–579 (1973). The State Bar, by providing that

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[21] The District Court stated that the State Bar acted in only a "minor role" as far as the price fixing was concerned, 355 F. Supp., at 496, and one member of the Court of Appeals panel was prepared to exonerate the State Bar because its participation was so minimal as to be insufficient to impose Sherman Act liability. 497 F. 2d, at 21 (Craven, J., concurring and dissenting). Of course, an alleged participant in a restraint of trade may have so insubstantial a connection with the restraint that liability under the Sherman Act would not be found, see *United States* v. *National Assn. of Real Estate Boards*, 339 U. S., at 495; however, that is not the case here. The State Bar's fee schedule reports provided the impetus for the County Bar, on two occasions, to adopt minimum-fee schedules. More important, the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths.

deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.[22] *Parker* v. *Brown, supra,* at 351–352. Its activities resulted in a rigid price floor from which petitioners, as consumers, could not escape if they wished to borrow money to buy a home.

III

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." *United States* v. *Oregon State Medical Society,* 343 U. S. 326, 336 (1952). See also *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608, 611–613 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts." See *Sperry* v. *Florida ex rel. Florida Bar,* 373 U. S. 379, 383 (1963); *Cohen* v. *Hurley,* 366 U. S. 117, 123–124 (1961); *Law Students Research Council* v. *Wadmond,* 401 U. S. 154,

[22] The State Bar also contends that it is protected by the Eleventh Amendment. See *Edelman* v. *Jordan,* 415 U. S. 651 (1974). Petitioners dispute this contention, and the District Court had no occasion to reach it in view of its holding. Given the record before us we intimate no view on the issue, leaving it for the District Court on remand.

157 (1971). In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

The judgment of the Court of Appeals is reversed and the case is remanded to that court with orders to remand to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MURPHY *v.* FLORIDA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–5116. Argued April 15, 1975—Decided June 16, 1975

Petitioner, who was convicted in state court of robbery, contends in this habeas corpus proceeding that he was denied a fair trial because jurors had learned from news accounts of prior felony convictions or certain facts about the robbery charge. In the course of jury selection 78 members of the panel were questioned, 70 being excused (30 for personal reasons, 20 peremptorily, and 20 by the court as having prejudged petitioner), and eight being selected (including two alternates). The District Court and the Court of Appeals denied relief. *Held:*

1. Juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged do not alone presumptively deprive the defendant of due process. *Irvin* v. *Dowd*, 366 U. S. 717; *Rideau* v. *Louisiana*, 373 U. S. 723; *Estes* v. *Texas*, 381 U. S. 532; *Sheppard* v. *Maxwell*, 384 U. S. 333, distinguished. Pp. 797–799.

2. The *voir dire* in this case indicates no such juror hostility to petitioner as to suggest a partiality that could not be laid aside. Though some jurors vaguely recalled the robbery and each had some knowledge of petitioner's past crimes, none betrayed any belief in the relevance to the robbery case of petitioner's past, and there was no indication from the circumstances surrounding petitioner's trial or from the number of the panel excused for prejudgment of petitioner, of inflamed community sentiment to counter the indicia of impartiality disclosed by the *voir dire* transcript. Thus, in the totality of the circumstances, petitioner failed to show inherent prejudice in the trial setting or actual prejudice from the jury-selection process. Pp. 799–803.

495 F. 2d 553, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 803. BRENNAN, J., filed a dissenting opinion, *post*, p. 804.

Harvey S. Swickle argued the cause and filed a brief for petitioner.

William L. Rogers, Assistant Attorney General of Florida, argued the cause for respondent *pro hac vice.* With him on the brief was *Robert L. Shevin,* Attorney General.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented by this case is whether the petitioner was denied a fair trial because members of the jury had learned from news accounts about a prior felony conviction or certain facts about the crime with which he was charged. Under the circumstances of this case, we find that petitioner has not been denied due process, and we therefore affirm the judgment below.

I

Petitioner was convicted in the Dade County, Fla., Criminal Court in 1970 of breaking and entering a home, while armed, with intent to commit robbery, and of assault with intent to commit robbery. The charges stemmed from the January 1968 robbery of a Miami Beach home and petitioner's apprehension, with three others, while fleeing from the scene.

The robbery and petitioner's arrest received extensive press coverage because petitioner had been much in the news before. He had first made himself notorious for his part in the 1964 theft of the Star of India sapphire from a museum in New York. His flamboyant lifestyle made him a continuing subject of press interest; he was generally referred to—at least in the media—as "Murph the Surf."

Before the date set for petitioner's trial on the instant charges, he was indicted on two counts of murder in

Broward County, Fla. Thereafter the Dade County court declared petitioner mentally incompetent to stand trial; he was committed to a hospital and the prosecutor *nolle prossed* the robbery indictment. In August 1968 he was indicted by a federal grand jury for conspiring to transport stolen securities in interstate commerce. After petitioner was adjudged competent for trial, he was convicted on one count of murder in Broward County (March 1969) and pleaded guilty to one count of the federal indictment involving stolen securities (December 1969). The indictment for robbery was refiled in August 1969 and came to trial one year later.

The events of 1968 and 1969 drew extensive press coverage. Each new case against petitioner was considered newsworthy, not only in Dade County but elsewhere as well.[1] The record in this case contains scores of articles reporting on petitioner's trials and tribulations during this period; many purportedly relate statements that petitioner or his attorney made to reporters.

Jury selection in the present case began in August 1970. Seventy-eight jurors were questioned. Of these, 30 were excused for miscellaneous personal reasons; 20 were excused peremptorily by the defense or prosecution; 20 were excused by the court as having prejudged petitioner; and the remaining eight served as the jury and two alternates. Petitioner's motions to dismiss the chosen jurors, on the ground that they were aware that he had previously been convicted of either the 1964 Star of India theft or the Broward County murder, were denied, as was his renewed motion for a change of venue based on allegedly prejudicial pretrial publicity.

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[1] See, *e. g.*, New York Times, May 9, 1968, p. 51 (surrender on murder indictment); July 3, 1968, p. 70 (held incompetent to stand trial); Aug. 15, 1968, p. 44 (indicted in securities case); Feb. 18, 1969, p. 31 (murder trial scheduled); Mar. 2, 1969, p. 63 (convicted of murder).

At trial, petitioner did not testify or put in any evidence; assertedly in protest of the selected jury, he did not cross-examine any of the State's witnesses. He was convicted on both counts, and after an unsuccessful appeal he sought habeas corpus relief in the District Court for the Southern District of Florida.

The District Court denied petitioner relief, 363 F. Supp. 1224 (1973), and the Court of Appeals for the Fifth Circuit affirmed. 495 F. 2d 553 (1974). We granted certiorari, 419 U. S. 1088 (1974), in order to resolve the apparent conflict between the decision below and that of the Third Circuit in *United States ex rel. Doggett* v. *Yeager*, 472 F. 2d 229 (1973), over the applicability of *Marshall* v. *United States*, 360 U. S. 310 (1959), to state criminal proceedings.

II

The defendant in *Marshall* was convicted of dispensing certain drugs without a prescription. In the course of the trial seven of the jurors were exposed to various news accounts relating that Marshall had previously been convicted of forgery, that he and his wife had been arrested for other narcotics offenses, and that he had for some time practiced medicine without a license. After interviewing the jurors, however, the trial judge denied a motion for a mistrial, relying on the jurors' assurances that they could maintain impartiality in spite of the news articles.

Noting that the jurors had been exposed to information with a high potential for prejudice, this Court reversed the conviction. It did so, however, expressly "[i]n the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts," and not as a matter of constitutional compulsion. *Id.*, at 313.

In the face of so clear a statement, it cannot be maintained that *Marshall* was a constitutional ruling now applicable, through the Fourteenth Amendment, to the States. Petitioner argues, nonetheless, that more recent decisions of this Court have applied to state cases the principle underlying the *Marshall* decision:[2] that persons who have learned from news sources of a defendant's prior criminal record are presumed to be prejudiced. We cannot agree that *Marshall* has any application beyond the federal courts.

Petitioner relies principally upon *Irvin* v. *Dowd*, 366 U. S. 717 (1961), *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), *Estes* v. *Texas*, 381 U. S. 532 (1965), and *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966). In each of these cases, this Court overturned a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage.

In *Irvin* v. *Dowd* the rural community in which the trial was held had been subjected to a barrage of inflammatory publicity immediately prior to trial, including information on the defendant's prior convictions, his confession to 24 burglaries and six murders including the one for which he was tried, and his unaccepted offer to plead guilty in order to avoid the death sentence. As a result, eight of the 12 jurors had formed an opinion that the defendant was guilty before the trial began; some went "so far as to say that it would take evidence to overcome their belief" in his guilt. 366 U. S., at 728. In these circumstances, the Court readily found actual prejudice against the petitioner to a degree that rendered a fair trial impossible.

Prejudice was presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Sheppard* were

[2] This was the theory adopted by the Third Circuit in *United States ex rel. Doggett* v. *Yeager*, 472 F. 2d 229 (1973).

held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In *Rideau* the defendant had "confessed" under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the *voir dire* for evidence of actual prejudice because it considered the trial under review "but a hollow formality"—the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

The trial in *Estes* had been conducted in a circus atmosphere, due in large part to the intrusions of the press, which was allowed to sit within the bar of the court and to overrun it with television equipment. Similarly, *Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

III

The constitutional standard of fairness requires that a defendant have "a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd,* 366 U. S., at 722. Qualified

jurors need not, however, be totally ignorant of the facts and issues involved.

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.*, at 723.

At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Ibid.*

The *voir dire* in this case indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside. Some of the jurors had a vague recollection of the robbery with which petitioner was charged and each had some knowledge of petitioner's past crimes,[3] but none betrayed any belief in the relevance of petitioner's past to the present case.[4] Indeed, four of the six jurors volunteered their

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[3] One juror who did not know that petitioner had been previously convicted for the theft of the Star of India sapphire, one who did not know of the murder conviction, and one who had never heard about the securities case were informed about them by petitioner's counsel, who then asked whether that knowledge would not prejudice them against petitioner. We will not readily discount the assurances of a juror insofar as his exposure to a defendant's past crimes comes from the defendant or counsel. We note also, and disapprove, counsel's habitual references to his client, at *voir dire*, as "Murph the Surf" rather than by his name.

[4] We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have

views of its irrelevance, and one suggested that people who have been in trouble before are too often singled out for suspicion of each new crime—a predisposition that could only operate in petitioner's favor.

In the entire *voir dire* transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror. In response to a leading and hypothetical question, presupposing a two- or three-week presentation of evidence against petitioner and his failure to put on any defense, one juror conceded that his prior impression of petitioner would dispose him to convict.[5] We cannot attach great sig-

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in the past distinguished largely factual publicity from that which is invidious or inflammatory. *E. g., Beck* v. *Washington,* 369 U. S. 541, 556 (1962). To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.

[5] The entire exchange appears at App. 139:

"Q. Now, when you go into that jury room and you decide upon Murphy's guilt or innocence, you are going to take into account that fact that he is a convicted murderer; aren't you?

"A. Not if we are listening to the case, I wouldn't.

"Q. But you know about it?

"A. How can you not know about it?

"Q. Fine, thank you.

"When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?

"A. We are not trying him for murder.

"Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

"A. I didn't know he was a convicted jewel thief.

"Q. Oh, I see.

"I am sorry I put words in your mouth.

"Now, sir, after two or three weeks of being locked up in a downtown hotel, as the Court determines, and after hearing the State's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, 'I am innocent, Mr. [juror's

nificance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all.

The juror testified that he did not keep up with current events and, in fact, had never heard of petitioner until he arrived in the room for prospective jurors where some veniremen were discussing him. He did not know that petitioner was "a convicted jewel thief" even then; it was petitioner's counsel who informed him of this fact. And he volunteered that petitioner's murder conviction, of which he had just heard, would not be relevant to his guilt or innocence in the present case, since "[w]e are not trying him for murder."

Even these indicia of impartiality might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory, but the circumstances surrounding petitioner's trial are not at all of that variety. Petitioner attempts to portray them as inflammatory by reference to the publicity to which the community was exposed. The District Court found, however, that the news articles concerning petitioner had appeared almost entirely during the period between December 1967 and January 1969, the latter date being seven months before the jury in this case was selected. 363 F. Supp., at 1228. They were, moreover, largely factual in nature. Compare *Beck* v. *Washington*, 369 U. S. 541 (1962), with *Sheppard* v. *Maxwell*, *supra*.

The length to which the trial court must go in order

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name],'—when you go into the jury room, sir, all these facts are going to influence your verdict?

"A. I imagine it would be.

"Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, 'My experience of him is such that right now I would find him guilty.'

"A. I believe so."

to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality. In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it. In *Irvin* v. *Dowd,* for example, the Court noted that 90% of those examined on the point were inclined to believe in the accused's guilt, and the court had excused for this cause 268 of the 430 veniremen. In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt.[6] This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own.

In sum, we are unable to conclude, in the circumstances presented in this case, that petitioner did not receive a fair trial. Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice. The judgment of the Court of Appeals must therefore be

Affirmed.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with MR. JUSTICE BRENNAN that the trial judge was woefully remiss in failing to insulate prospective jurors from the bizarre media coverage of this case

[6] If persons who were excused for other reasons also exhibited a disqualifying opinion as to guilt, petitioner has not so claimed.

and in not taking steps to prevent pretrial discussion of the case among them. Although I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case, I agree with the Court that the circumstances of petitioner's trial did not rise to the level of a violation of the Due Process Clause of the Fourteenth Amendment.

MR. JUSTICE BRENNAN, dissenting.

I dissent. *Irvin* v. *Dowd*, 366 U. S. 717 (1961), requires reversal of this conviction. As in that case, petitioner here was denied a fair trial. The risk that taint of widespread publicity regarding his criminal background, known to all members of the jury, infected the jury's deliberations is apparent, the trial court made no attempt to prevent discussion of the case or petitioner's previous criminal exploits among the prospective jurors, and one juror freely admitted that he was predisposed to convict petitioner.

During *voir dire*, petitioner's counsel had the following colloquy with that juror:

> "Q. Now, when you go into that jury room and you decide upon Murphy's guilt or innocence, you are going to take into account that fact that he is a convicted murderer; aren't you?
>
> "A. Not if we are listening to the case, I wouldn't.
>
> "Q. But you know about it?
>
> "A. How can you not know about it?
>
> "Q. Fine, thank you.
>
> "When you go into the jury room, the fact that he is a convicted murderer, that is going to influence your verdict; is it not?
>
> "A. We are not trying him for murder.
>
> "Q. The fact that he is a convicted murderer and jewel thief, that would influence your verdict?

"A. I didn't know he was a convicted jewel thief.

"Q. Oh, I see.

"I am sorry I put words in your mouth.

"Now, sir, after two or three weeks of being locked up in a downtown hotel, as the Court determines, and after hearing the State's case, and after hearing no case on behalf of Murphy, and hearing no testimony from Murphy saying, 'I am innocent, Mr. [Juror]'—when you go into the jury room, sir, all these facts are going to influence your verdict?

"A. I imagine it would be.

"Q. And in fact, you are saying if Murphy didn't testify, and if he doesn't offer evidence, 'My experience of him is such that right now I would find him guilty.'

"A. I believe so."

I cannot agree with the Court that the obvious bias of this juror may be overlooked simply because the juror's response was occasioned by a "leading and hypothetical question," *ante*, at 801. Indeed, the hypothetical became reality when petitioner chose not to take the stand and offered no evidence. Thus petitioner was tried by a juror predisposed, because of his knowledge of petitioner's previous crimes, to find him guilty of this one.

Others who ultimately served as jurors revealed similar prejudice toward petitioner on *voir dire*. One juror conceded that it would be difficult, during deliberations, to put out of his mind that petitioner was a convicted criminal. He also admitted that he did not "hold a convicted felon in the same regard as another person who has never been convicted of a felony," and admitted further that he had termed petitioner a "menace."

A third juror testified that she knew from several

sources that petitioner was a convicted murderer,[1] and was aware that the community regarded petitioner as a criminal who "should be put away." She disclaimed having a fixed opinion about the result she would reach, but acknowledged that the fact that petitioner was a convicted criminal would probably influence her verdict:

> "Q. Now, if you go into that jury room and deliberate with your fellow jurors, in your deliberations, will you consider the fact that Murphy is a convicted murderer and jewel thief?
>
> "A. Well, he has been convicted of murder. So, I guess that is what I would—
>
> "Q. You would consider that in your verdict, right?
>
> "A. Right.
>
> "Q. And that would influence your verdict; would it not?
>
> "A. If that is what you say, I guess it would.
>
> "Q. I am not concerned about what I say, because if I said it, they wouldn't print it. It would influence your verdict?
>
> "A. It probably would.
>
> . . . . .
>
> "Q. When you go into that jury room, you cannot forget the fact that it is Murph the Surf; that he is a convicted murderer, and a jewel thief—you can't put that out of your mind, no matter what they tell you; can you, ma'am?

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[1] The juror stated that she acquired a portion of her knowledge of petitioner's criminal background from an article in that week's Miami Herald entitled "Defense Exhausts Jury Challenges in Murphy Trial," which included the sentence: "Jury selection will continue today in the trial of beach boy hoodlum serving a life sentence for murder in connection with the Whisky Creek slaying of two secretaries in 1968."

"A. Probably not.

"Q. And it would influence your verdict; right?

"A. Probably."

Still another juror testified that the comments of venire members in discussing the case had made him "sick to [his] stomach." He testified that one venireman had said that petitioner was "thoroughly rotten," and that another had said: "Hang him, he's guilty." [2]

Moreover, the Court ignores the crucial significance of the fact that at no time before or during this daily buildup of prejudice against Murphy did the trial judge instruct the prospective jurors not to discuss the case among themselves. Indeed the trial judge took no steps to insulate the jurors from media coverage of the case or from the many news articles that discussed petitioner's last criminal exploits.

It is of no moment that several jurors ultimately testified that they would try to exclude from their deliberations their knowledge of petitioner's past misdeeds and of his community reputation. *Irvin* held in like circum-

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[2] A juror chosen as an alternate testified that she did not know whether she "would give the same fair and impartial treatment to a convicted killer as [she] would to another person." She added that she did not know whether she could be fair and impartial in her deliberations in the case:

"Q. The question is, would you compromise your verdict; could you go there—and say the State proved his guilt and the defense proved that he was insane, but, 'I'm not going to let that guy walk the streets, so I'm going to find him guilty, period?'

"Would you do that?

"A. I don't know at this point.

"Q. Right.

"So in fact, ma'am, at this point you cannot tell us whether you can give a fair and impartial deliberation about Murphy, number one, because of the lack of evidence; and number two, because of what you know about Murphy; isn't that a fact?

"A. Yes."

stances that little weight could be attached to such self-serving protestations:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.'" 366 U. S., at 728.

On the record of this *voir dire*, therefore, the conclusion is to me inescapable that the attitude of the entire venire toward Murphy reflected the "then current community pattern of thought as indicated by the popular news media," *id.*, at 725, and was infected with the taint of the view that he was a "criminal" guilty of notorious offenses, including that for which he was on trial. It is a plain case, from a review of the entire *voir dire*, where "the extent and nature of the publicity has caused such a build up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial." *United States ex rel. Bloeth* v. *Denno*, 313 F. 2d 364, 372 (CA2 1963). In my view, the denial of a change of venue was therefore prejudicial error, and I would reverse the conviction.

BIGELOW *v.* VIRGINIA

APPEAL FROM THE SUPREME COURT OF VIRGINIA

No. 73–1309. Argued December 18, 1974—Decided June 16, 1975

Appellant, the managing editor of a weekly newspaper published in Virginia, as the result of publishing a New York City organization's advertisement announcing that it would arrange low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York (where abortions were legal and there were no residency requirements), was convicted of violating a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the processing of an abortion. The trial court had rejected appellant's claim that the statute was unconstitutional under the First Amendment as made applicable to the States by the Fourteenth as being facially overbroad and as applied to appellant. The Virginia Supreme Court affirmed the conviction, also rejecting appellant's First Amendment claim and holding that the advertisement was a commercial one which could be constitutionally prohibited under the State's police power, and that because appellant himself lacked a legitimate First Amendment interest inasmuch as his activity "was of a purely commercial nature," he had no standing to challenge the statute as being facially overbroad. *Held:*

1. Though an intervening amendment of the statute as a practical matter moots the overbreadth issue for the future, the Virginia courts erred in denying appellant standing to raise that issue since "pure speech" rather than conduct was involved and no consideration was given to whether or not the alleged overbreadth was substantial. Pp. 815–818.

2. The statute as applied to appellant infringed constitutionally protected speech under the First Amendment. Pp. 818–829.

(a) The Virginia courts erred in assuming that advertising, as such, was entitled to no First Amendment protection and that appellant had no legitimate First Amendment interest, since speech is not stripped of First Amendment protection merely because it appears in the form of a paid commercial advertisement, and the fact that the advertisement in question had com-

mercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. Pp. 818–821.

(b) Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience consisting of not only readers possibly in need of the services offered, but also those concerned with the subject matter or the law of another State, and readers seeking reform in Virginia; and thus appellant's First Amendment interests coincided with the constitutional interests of the general public. Pp. 821–822.

(c) A State does not acquire power or supervision over another State's internal affairs merely because its own citizens' welfare and health may be affected when they travel to the other State, and while a State may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave, it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State, as the placement services here were at the time they were advertised. Pp. 822–825.

(d) Virginia's asserted interest in regulating what Virginians may *hear* or *read* about the New York services or in shielding its citizens from information about activities outside Virginia's borders (which Virginia's police powers do not reach) is entitled to little, if any, weight under the circumstances. Pp. 826–828.

214 Va. 341, 200 S. E. 2d 680, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 829.

Melvin L. Wulf and *John C. Lowe* argued the cause for appellant. With them on the brief were *Joel M. Gora*, *Judith Mears*, and *F. Guthrie Gordon III*.

D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, argued the cause for appellee. With him on the brief were *Andrew P. Miller*, Attorney General,

Anthony F. Troy, Deputy Attorney General, and *Paul L. Gergoudis,* Assistant Attorney General.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

An advertisement carried in appellant's newspaper led to his conviction for a violation of a Virginia statute that made it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The issue here is whether the editor-appellant's First Amendment rights were unconstitutionally abridged by the statute. The First Amendment, of course, is applicable to the States through the Fourteenth Amendment. *Schneider* v. *State,* 308 U. S. 147, 160 (1939).

I

The Virginia Weekly was a newspaper published by the Virginia Weekly Associates of Charlottesville. It was issued in that city and circulated in Albemarle County, with particular focus on the campus of the University of Virginia. Appellant, Jeffrey C. Bigelow, was a director and the managing editor and responsible officer of the newspaper.[1]

On February 8, 1971, the Weekly's Vol. V, No. 6, was published and circulated under the direct re-

**Raymond T. Bonner* and *Alan B. Morrison* filed a brief for Public Citizen et al. as *amici curiae* urging reversal.

Michael M. Kearney filed a brief for Virginia Right to Life, Inc., as *amicus curiae* urging affirmance.

[1] His brief describes the publication as an "underground newspaper." Brief for Appellant 3. The appellee states that there is no evidence in the record to support that description. Brief for Appellee 3 n. 1.

sponsibility of the appellant. On page 2 of that issue was the following advertisement:

"UNWANTED PREGNANCY
LET US HELP YOU
Abortions are now legal in New York.
There are no residency requirements.
FOR IMMEDIATE PLACEMENT IN ACCREDITED
HOSPITALS AND CLINICS AT LOW COST
Contact
WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022
or call any time
(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK
STRICTLY CONFIDENTIAL. We will make
all arrangements for you and help you
with information and counseling."

It is to be observed that the advertisement announced that the Women's Pavilion of New York City would help women with unwanted pregnancies to obtain "immediate placement in accredited hospitals and clinics at low cost" and would "make all arrangements" on a "strictly confidential" basis; that it offered "information and counseling"; that it gave the organization's address and telephone numbers; and that it stated that abortions "are now legal in New York" and there "are no residency requirements." Although the advertisement did not contain the name of any licensed physician, the "placement" to which it referred was to "accredited hospitals and clinics."

On May 13 Bigelow was charged with violating Va. Code Ann. § 18.1-63 (1960). The statute at that time read:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt

> the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[2]

Shortly after the statute was utilized in Bigelow's case, and apparently before it was ever used again, the Virginia Legislature amended it and changed its prior application and scope.[3]

Appellant was first tried and convicted in the County Court of Albemarle County. He appealed to the Circuit Court of that county where he was entitled to a *de novo* trial. Va. Code Ann. §§ 16.1–132 and 16.1–136 (1960). In the Circuit Court he waived a jury and in July 1971

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[2] We were advised by the State at oral argument that the statute dated back to 1878, and that Bigelow's was the first prosecution under the statute "in modern times," and perhaps the only prosecution under it "at any time." Tr. of Oral Arg. 40. The statute appears to have its origin in Va. Acts of Assembly 1877–1878, p. 281, c. 2, § 8.

[3] The statute, as amended by Va. Acts of Assembly 1972, c. 725, now reads:

"18.1–63. If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

It is to be observed that the amendment restricts the statute's application, with respect to advertising, to an abortion illegal in Virginia and to be performed there. Since the State's statutes purport to define those abortions that are legal when performed in the State, see Va. Code Ann. §§ 18.1–62.1 and 18.1–62.3 (Supp. 1975), the State at oral argument described the pre-1972 form of § 18.1–63 as "effectively repealed by amendment," and, citing *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), the statute, as amended, as limited to an abortion performed by a nonphysician. Tr. of Oral Arg. 38–39. In any event, there is no dispute here that the amended statute would *not* reach appellant's advertisement.

was tried to the judge. The evidence consisted of stipulated facts; an excerpt, containing the advertisement in question, from the Weekly's issue of February 8, 1971; and the June 1971 issue of Redbook magazine, containing abortion information and distributed in Virginia and in Albemarle County. App. 3, 8. The court rejected appellant's claim that the statute was unconstitutional and adjudged him guilty. He was sentenced to pay a fine of $500, with $350 thereof suspended "conditioned upon no further violation" of the statute. *Id.*, at 5.

The Supreme Court of Virginia granted review and, by a 4–2 vote, affirmed Bigelow's conviction. 213 Va. 191, 191 S. E. 2d 173 (1972). The court first rejected the appellant's claim that the advertisement was purely informational and thus was not within the "encourage or prompt" language of the statute. It held, instead, that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service, rather than a passive statement of fact." *Id.*, at 193, 191 S. E. 2d, at 174. It then rejected Bigelow's First Amendment claim. This, the court said, was a "commercial advertisement" and, as such, "may be constitutionally prohibited by the state," particularly "where, as here, the advertising relates to the medical-health field." *Id.*, at 193–195, 191 S. E. 2d, at 174–176. The issue, in the court's view, was whether the statute was a valid exercise of the State's police power. It answered this question in the affirmative, noting that the statute's goal was "to ensure that pregnant women in Virginia who decided to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder." *Id.*, at 196, 191 S. E. 2d, at 176. The court then turned to Bigelow's claim of overbreadth. It held that because the

appellant himself lacked a legitimate First Amendment interest, inasmuch as his activity "was of a purely commercial nature," he had no "standing to rely upon the hypothetical rights of those in the non-commercial zone." *Id.*, at 198, 191 S. E. 2d, at 177–178.

Bigelow took a timely appeal to this Court. During the pendency of his appeal, *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), were decided. We subsequently vacated Bigelow's judgment of conviction and remanded the case for further consideration in the light of *Roe* and *Doe*. 413 U. S. 909 (1973).[4]

The Supreme Court of Virginia, on such reconsideration, but without further oral argument, again affirmed appellant's conviction, observing that neither *Roe* nor *Doe* "mentioned the subject of abortion advertising" and finding nothing in those decisions "which in any way affects our earlier view." [5] 214 Va. 341, 342, 200 S. E. 2d 680 (1973). Once again, Bigelow appealed. We noted probable jurisdiction in order to review the important First Amendment issue presented. 418 U. S. 909 (1974).

II

This Court often has recognized that a defendant's standing to challenge a statute on First Amendment grounds as facially overbroad does not depend upon whether his own activity is shown to be constitutionally privileged. The Court consistently has permitted "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own

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[4] See Note, The First Amendment and Commercial Advertising: Bigelow v. Commonwealth, 60 Va. L. Rev. 154 (1974).

[5] Virginia asserts, rightfully we feel, that this is "a First Amendment case" and "not an abortion case." Brief for Appellee 15 n. 6; Tr. of Oral Arg. 26.

conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965). See also *Grayned* v. *City of Rockford*, 408 U. S. 104, 114 (1972); *Gooding* v. *Wilson*, 405 U. S. 518, 520–521 (1972); *Coates* v. *City of Cincinnati*, 402 U. S. 611, 616 (1971), and *id.*, at 619–620 (WHITE, J., dissenting); *NAACP* v. *Button*, 371 U. S. 415, 432 (1963); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940). The Supreme Court of Virginia itself recognized this principle when it recently stated that "persons who engage in non-privileged conduct are not precluded from attacking a statute under which they were convicted." *Owens* v. *Commonwealth*, 211 Va. 633, 638–639, 179 S. E. 2d 477, 481 (1971). "For in appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U. S., at 432. See generally Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 847–848 (1970).

This "exception to the usual rules governing standing," *Dombrowski* v. *Pfister*, 380 U. S., at 486, reflects the transcendent value to all society of constitutionally protected expression. We give a defendant standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S., at 433.

Of course, in order to have standing, an individual must present more than "[a]llegations of a subjective 'chill.'" There must be a "claim of specific present ob-

jective harm or a threat of specific future harm." *Laird* v. *Tatum,* 408 U. S. 1, 13–14 (1972). That requirement, however, surely is met under the circumstances of this case, where the threat of prosecution already has blossomed into the reality of a conviction, and where there can be no doubt concerning the appellant's personal stake in the outcome of the controversy. See *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). The injury of which appellant complains is one to him as an editor and publisher of a newspaper; he is not seeking to raise the hypothetical rights of others. See *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 166 (1972); *Breard* v. *Alexandria,* 341 U. S. 622, 641 (1951). Indeed, unlike some cases in which the standing issue similarly has been raised, the facts of this case well illustrate "the statute's potential for sweeping and improper applications." *Gooding* v. *Wilson,* 405 U. S., at 532–533 (BURGER, C. J., dissenting).

Declaring a statute facially unconstitutional because of overbreadth "is, manifestly, strong medicine," and "has been employed by the Court sparingly and only as a last resort." *Broadrick* v. *Oklahoma,* 413 U. S. 601, 613 (1973). But we conclude that the Virginia courts erred in denying Bigelow standing to make this claim, where "pure speech" rather than conduct was involved, without any consideration of whether the alleged overbreadth was or was not substantial. *Id.,* at 615, 616. The Supreme Court of Virginia placed no effective limiting construction on the statute. Indeed, it characterized the rights of doctors, husbands, and lecturers as "hypothetical," and thus seemed to imply that, although these were in the noncommercial zone, the statute might apply to them, too.

In view of the statute's amendment since Bigelow's conviction in such a way as "effectively to repeal" its prior application, there is no possibility now that the

statute's pre-1972 form will be applied again to appellant or will chill the rights of others. As a practical matter, the issue of its overbreadth has become moot for the future. We therefore decline to rest our decision on overbreadth and we pass on to the further inquiry, of greater moment not only for Bigelow but for others, whether the statute as applied to appellant infringed constitutionally protected speech.

III

A. The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form. *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U. S. 376, 384 (1973); *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 266 (1964).

The fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees. The State was not free of constitutional restraint merely because the advertisement involved sales or "solicitations," *Murdock* v. *Pennsylvania,* 319 U. S. 105, 110–111 (1943), or because appellant was paid for printing it, *New York Times Co.* v. *Sullivan,* 376 U. S., at 266; *Smith* v. *California,* 361 U. S. 147, 150 (1959), or because appellant's motive or the motive of the advertiser may have involved financial gain, *Thomas* v. *Collins,* 323 U. S. 516, 531 (1945). The existence of "commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." *Ginzburg* v. *United States,* 383 U. S. 463, 474 (1966).

Although other categories of speech—such as fighting words, *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942), or obscenity, *Roth* v. *United States,* 354 U. S. 476, 481–485 (1957), *Miller* v. *California,* 413 U. S. 15, 23 (1973), or libel, *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974), or incitement, *Brandenburg* v. *Ohio,* 395 U. S. 444 (1969)—have been held unprotected, no contention has been made that the particular speech embraced in the advertisement in question is within any of these categories.

The appellee, as did the Supreme Court of Virginia, relies on *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), where a unanimous Court, in a brief opinion, sustained an ordinance which had been interpreted to ban the distribution of a handbill advertising the exhibition of a submarine. The handbill solicited customers to tour the ship for a fee. The promoter-advertiser had first attempted to distribute a single-faced handbill consisting only of the advertisement, and was denied permission to do so. He then had printed, on the reverse side of the handbill, a protest against official conduct refusing him the use of wharfage facilities. The Court found that the message of asserted "public interest" was appended solely for the purpose of evading the ordinance and therefore did not constitute an "exercise of the freedom of communicating information and disseminating opinion." *Id.,* at 54. It said:

> "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Ibid.*

But the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestensen* is

authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.[6]

This Court's cases decided since *Chrestensen* clearly demonstrate as untenable any reading of that case that would give it so broad an effect. In *New York Times Co.* v. *Sullivan*, *supra*, a city official instituted a civil libel action against four clergymen and the New York Times. The suit was based on an advertisement carried in the newspaper criticizing police action against members of the civil rights movement and soliciting contributions for the movement. The Court held that this advertisement, although containing factually erroneous defamatory content, was entitled to the same degree of constitutional protection as ordinary speech. It said:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." 376 U. S., at 266.

Chrestensen was distinguished on the ground that the handbill advertisement there did no more than propose

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[6] MR. JUSTICE DOUGLAS, who was a Member of the Court when *Chrestensen* was decided and who joined that opinion, has observed: "The ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States*, 358 U. S. 498, 514 (1959) (concurring opinion). MR. JUSTICE BRENNAN, joined by JUSTICES STEWART, MARSHALL, and POWELL, has observed: "There is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine* v. *Chrestensen* . . . retains continuing validity." *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 314 n. 6 (1974) (dissenting opinion). See also *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *id.*, at 398 (DOUGLAS, J., dissenting); *id.*, at 401 (STEWART, J., dissenting).

a purely commercial transaction, whereas the one in *New York Times*

> "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Ibid.*

The principle that commercial advertising enjoys a degree of First Amendment protection was reaffirmed in *Pittsburgh Press Co.* v. *Human Rel. Comm'n,* 413 U. S. 376 (1973). There, the Court, although divided, sustained an ordinance that had been construed to forbid newspapers to carry help-wanted advertisements in sex-designated columns except where based upon a bona fide occupational exemption. The Court did describe the advertisements at issue as "classic examples of commercial speech," for each was "no more than a proposal of possible employment." *Id.,* at 385. But the Court indicated that the advertisements would have received some degree of First Amendment protection if the commercial proposal had been legal. The illegality of the advertised activity was particularly stressed:

> "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.,* at 389.

B. The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at

issue and those involved in *Chrestensen* and in *Pittsburgh Press*. The advertisement published in appellant's newspaper did more than simply propose a commercial transaction. It contained factual material of clear "public interest." Portions of its message, most prominently the lines, "Abortions are now legal in New York. There are no residency requirements," involve the exercise of the freedom of communicating information and disseminating opinion.

Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. See *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public.[7]

Moreover, the placement services advertised in appellant's newspaper were legally provided in New York at that time.[8] The Virginia Legislature could not have

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[7] It was argued, too, that under the circumstances the appearance of the advertisement in the appellant's newspaper was "an implicit editorial endorsement" of its message. Brief for Appellant 29.

[8] Subsequent to Bigelow's publication of the advertisement in February 1971, New York adopted Laws 1971, c. 725, effective July 1, 1971, amended by Laws 1972, c. 17, § 1, now codified as Art.

regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State.[9] *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892).

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45 of the State's Public Health Law (Supp. 1974–1975). Section 4500 contains a legislative finding:

"Medical referral services, organized as profit making enterprises within this state, have been . . . in violation of the standards of ethics and public policy applicable to the practice of medicine and which would be violations of standards of professional conduct if the acts were performed by physicians. . . . It is hereby declared to be the public policy of this state . . . that such profit making medical referral service organizations be declared to be invalid and unlawful in this state."

Section 4501 (1) provides:

"No person, firm, partnership, association or corporation, or agent or employee thereof, shall engage in for profit any business or service which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition. The imposition of a fee or charge for any such referral or recommendation shall create a presumption that the business or service is engaged in for profit."

A violation of the statute is a misdemeanor punishable by imprisonment for not longer than one year or a fine of not more than $5,000 or both. § 4502 (1). Article 45 expressly is made inapplicable to a nonprofit corporation exempt from federal income taxation under § 501 (c) of the Internal Revenue Code of 1954, 26 U. S. C. § 501 (c). § 4503.

The 1971 statute has been upheld against constitutional challenge. *S. P. S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373 (SDNY 1971).

[9] In 1972, after Bigelow's prosecution was begun, Virginia adopted Acts of Assembly 1972, c. 642, now codified as Va. Code Ann. § 18.1–417.2 (Supp. 1975). This statute is similar to the New York statute described in n. 8, *supra*, and is directed at for-profit medical referrals within Virginia. The statute prohibits engaging for profit "in any business which in whole or in part includes the referral or recommendation of persons to a physician, hospital, health related facility, or dispensary for any form of medical care or treatment of any ailment or physical condition." Acceptance of a fee for any

Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded, Tr. of Oral Arg. 29, prosecute them for going there. See *United States* v. *Guest*, 383 U. S. 745, 757–759 (1966); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969); *Doe* v. *Bolton*, 410 U. S., at 200. Virginia possessed no authority to regulate the services provided in New York—the skills and credentials of the New York physicians and of the New York professionals who assisted them, the standards of the New York hospitals and clinics to which patients were referred, or the practices and charges of the New York referral services.

A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar

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such referral or recommendation "shall create a presumption that the business is engaged in such service for profit." Violation of the statute is a misdemeanor punishable by imprisonment for not longer than one year or a fine of not more than $5,000, or both.

By a 1973 amendment, Acts of Assembly 1973, c. 529, to its statute dealing with unprofessional conduct by a member of the medical or a related profession, Virginia prohibits advertising by a physician. Specifically, Va. Code Ann. § 54–317 (1974) now provides:

"Any practitioner of medicine . . . shall be considered guilty of unprofessional conduct if he:

. . . . . .

"(13) Advertises to the general public directly or indirectly in any manner his professional services, their costs, prices, fees, credit terms or quality."

See also Va. Code Ann. §§ 54–278.1 and 54–317 (4), (5), and (6) (1974).

We, of course, have no occasion to comment here on whatever constitutional issue, if any, may be raised with respect to these statutes.

a citizen of another State from disseminating information about an activity that is legal in that State.

C. We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.[10]

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[10] We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. Wholly apart from the respective rationales that may have been developed by the courts in those cases, their results are not inconsistent with our holding here. In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. See, *e. g.*, *United States* v. *Bob Lawrence Realty, Inc.*, 474 F. 2d 115, 121 (CA5), cert. denied, 414 U. S. 826 (1973); *Rockville Reminder, Inc.* v. *United States Postal Service*, 480 F. 2d 4 (CA2 1973); *United States* v. *Hunter*, 459 F. 2d 205 (CA4), cert. denied, 409 U. S. 934 (1972).

Nor need we comment here on the First Amendment ramifications of legislative prohibitions of certain kinds of advertising in the electronic media, where the "unique characteristics" of this form of communication "make it especially subject to regulation in the public interest." *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 584 (DC 1971), aff'd, 405 U. S. 1000 (1972). See also *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94 (1973).

Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156 (1973); *Head* v. *New Mexico Board*, 374 U. S. 424 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954); *Semler* v. *Dental Examiners*, 294 U. S. 608 (1935).

Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. See *Pittsburgh Press Co.* v. *Human Rel. Comm'n, supra; Lehman* v. *City of Shaker Heights,* 418 U. S. 298 (1974).[11] To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the governmental interest alleged. Advertising is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button,* 371 U. S., at 429. Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech "commercial" in widely varying degrees. We need not decide here the extent to which constitutional protection is afforded commercial advertising under all circumstances and in the face of all kinds of regulation.

IV

The task of balancing the interests at stake here was one that should have been undertaken by the Virginia courts before they reached their decision. We need not

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[11] See also *Adderley* v. *Florida,* 385 U. S. 39, 46–48 (1966); *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965); *Poulos* v. *New Hampshire,* 345 U. S. 395, 405 (1953); *Kunz* v. *New York,* 340 U. S. 290, 293–294 (1951); *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941).

remand for that purpose, however, because the outcome is readily apparent from what has been said above.

In support of the statute, the appellee contends that the commercial operations of abortion referral agencies are associated with practices, such as fee splitting, that tend to diminish, or at least adversely affect, the quality of medical care, and that advertising of these operations will lead women to seek services from those who are interested only or mainly in financial gain apart from professional integrity and responsibility.

The State, of course, has a legitimate interest in maintaining the quality of medical care provided within its borders. *Barsky* v. *Board of Regents,* 347 U. S. 442, 451 (1954). No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia. As applied to Bigelow's case, the statute was directed at the publishing of informative material relating to services offered in another State and was not directed at advertising by a referral agency or a practitioner whose activity Virginia had authority or power to regulate.

To be sure, the agency-advertiser's practices, although not then illegal, may later have proved to be at least "inimical to the public interest" in New York. *S. P. S. Consultants, Inc.* v. *Lefkowitz,* 333 F. Supp. 1373, 1378 (SDNY 1971).[12] But this development would not justify a Virginia statute that forbids Virginians from using in New York the then legal services of a local New York agency. Here, Virginia is really asserting an interest in regulating what Virginians may *hear* or *read* about the New York services. It is, in effect, advancing an interest in shielding its citizens from information about activities

[12] See *State* v. *Abortion Information Agency, Inc.,* 69 Misc. 2d 825, 323 N. Y. S. 2d 597 (1971); see also *Mitchell Family Planning, Inc.* v. *City of Royal Oak,* 335 F. Supp. 738 (ED Mich. 1972).

outside Virginia's borders, activities that Virginia's police powers do not reach. This asserted interest, even if understandable, was entitled to little, if any, weight under the circumstances.

No claim has been made, nor could any be supported on this record, that the advertisement was deceptive or fraudulent,[13] or that it related to a commodity or service that was then illegal in either Virginia or in New York, or that it otherwise furthered a criminal scheme in Virginia.[14] There was no possibility that appellant's activity would invade the privacy of other citizens, *Breard* v. *Alexandria, supra,* or infringe on other rights. Observers would not have the advertiser's message thrust upon them as a captive audience. *Lehman* v. *City of Shaker Heights, supra; Packer Corp.* v. *Utah,* 285 U. S. 105, 110 (1932).

The strength of appellant's interest was augmented by the fact that the statute was applied against him as publisher and editor of a newspaper, not against the advertiser or a referral agency or a practitioner. The prosecution thus incurred more serious First Amendment overtones.

If application of this statute were upheld under these circumstances, Virginia might exert the power sought here over a wide variety of national publications or interstate newspapers carrying advertisements similar to the one that appeared in Bigelow's newspaper or containing articles on the general subject matter to which

[13] See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1197–1198 (1965); Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1010–1015 (1967).

[14] We are not required to decide here what the First Amendment consequences would be if the Virginia advertisement promoted an activity in New York which was then illegal in New York. An example would be an advertisement announcing the availability of narcotics in New York City when the possession and sale of narcotics was proscribed in the State of New York.

the advertisement referred.[15] Other States might do the same. The burdens thereby imposed on publications would impair, perhaps severely, their proper functioning. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 257–258 (1974). We know from experience that "liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." 2 Z. Chafee, Government and Mass Communications 633 (1947). The policy of the First Amendment favors dissemination of information and opinion, and "[t]he guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . .' 2 Cooley, Constitutional Limitations 886 (8th ed.)." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 150 (1967) (opinion of Harlan, J.).

We conclude that Virginia could not apply Va. Code Ann. § 18.1–63 (1960), as it read in 1971, to appellant's publication of the advertisement in question without unconstitutionally infringing upon his First Amendment rights. The judgment of the Supreme Court of Virginia is therefore reversed.

It is so ordered.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE joins, dissenting.

The Court's opinion does not confront head-on the question which this case poses, but makes contact with

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[15] The State so indicated at oral argument. Tr. of Oral Arg. 37–38. It, however, was never so applied. In the light of its "effective repeal," as the State's counsel observed during the oral argument, "[w]e will never know" how far, under appellee's theory, it might have reached. *Id.*, at 38.

it only in a series of verbal sideswipes. The result is the fashioning of a doctrine which appears designed to obtain reversal of this judgment, but at the same time to save harmless from the effects of that doctrine the many prior cases of this Court which are inconsistent with it.

I am in agreement with the Court, *ante*, at 817–818, that Virginia's statute cannot properly be invalidated on grounds of overbreadth,[1] given that the sole prosecution which has ever been brought under this now substantially altered statute is that now in issue. "It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case." *Saia* v. *New York*, 334 U. S. 558, 571 (1948) (Jackson, J., dissenting).

Since the Court concludes, apparently from two lines of the advertisement, *ante*, at 812, that it conveyed information of value to those interested in the "subject matter or the law of another State and its development" and to those "seeking reform in Virginia," *ante*, at 822, and since the ad relates to abortion, elevated to constitutional stature by the Court, it concludes that this advertisement is entitled to something more than the limited constitutional protection traditionally accorded commercial advertising. See *ante*, at 825 n. 10. Although recognizing that "[a]dvertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest," *ante*, at 826, the Court for reasons not entirely clear to me concludes that Virginia's interest is of "little, if any, weight." *Ante*, at 828.

[1] The Court, *ante*, at 817, states that the Virginia Supreme Court placed no limiting interpretation on its statute and that it implied that the statute might apply to doctors, husbands, and lecturers. The Court is in error: the Virginia Supreme Court stated that it would not interpret the statute to encompass such situations. 213 Va. 191, 198, 191 S. E. 2d 173, 177 (1972).

If the Court's decision does, indeed, turn upon its conclusion that the advertisement here in question was protected by the First and Fourteenth Amendments, the subject of the advertisement ought to make no difference. It will not do to say, as the Court does, that this advertisement conveyed information about the "subject matter or the law of another State and its development" to those "seeking reform in Virginia," and that it related to abortion, as if these factors somehow put it on a different footing from other commercial advertising. This was a proposal to furnish services on a commercial basis, and since we have always refused to distinguish for First Amendment purposes on the basis of content, it is no different from an advertisement for a bucket shop operation or a Ponzi scheme which has its headquarters in New York. If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws.

As a threshold matter the advertisement appears to me, as it did to the courts below, to be a classic commercial proposition directed toward the exchange of services rather than the exchange of ideas. It was apparently also so interpreted by the newspaper which published it which stated in apparent apology in its following issue that the "'*Weekly* collective has since learned that this abortion agency . . . as well as a number of other commercial groups are charging women a fee for a service which is done free by Women's Liberation, Planned Parenthood, and others.'" 213 Va. 191, 194, 191 S. E. 2d 173, 175 (1972). Whatever slight factual content the advertisement may contain and

whatever expression of opinion may be laboriously drawn from it does not alter its predominantly commercial content. "If that evasion were successful, every merchant who desires to broadcast . . . need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command." *Valentine* v. *Chrestensen*, 316 U. S. 52, 55 (1942). See, *e. g.*, *Ginzburg* v. *United States*, 383 U. S. 463, 474 n. 17 (1966). I am unable to perceive any relationship between the instant advertisement and that for example in issue in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 292 (1964). Nor am I able to distinguish this commercial proposition from that held to be purely commercial in *Pittsburgh Press Co.* v. *Human Rel. Comm'n*, 413 U. S. 376 (1973). As the Court recognizes, *ante*, at 819–821, a purely commercial proposal is entitled to little constitutional protection.

Assuming *arguendo* that this advertisement is something more than a normal commercial proposal, I am unable to see why Virginia does not have a legitimate public interest in its regulation. The Court apparently concedes, *ante*, at 825 n. 10, and our cases have long held, that the States have a strong interest in the prevention of commercial advertising in the health field—both in order to maintain high ethical standards in the medical profession and to protect the public from unscrupulous practices. See, *e. g.*, *Semler* v. *Dental Examiners*, 294 U. S. 608, 612 (1935); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 490–491 (1955); *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156 (1973). And the interest asserted by the Supreme Court of Virginia in the Virginia statute was the prevention of commercial exploitation of those women who elect to have an abortion:

> "It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant

> women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient." 213 Va., at 196, 191 S. E. 2d, at 176.

The concern of the Virginia Supreme Court was not a purely hypothetical one. As the majority notes, *ante*, at 822–823, n. 8, although New York at the time of this advertisement allowed profitmaking abortion referral agencies, it soon thereafter passed legislation prohibiting commercial advertisement of the type here in issue. The court in *S. P. S. Consultants, Inc.* v. *Lefkowitz*, 333 F. Supp. 1373, 1378 (SDNY 1971), quoted the author of that legislation on the reasons for its passage:

> " 'Because New York State has the most liberal abortion statute within the Continental United States, thousands of women from all over the country are coming into New York State . . . . [M]ost of these women came here through referral agencies who advertise nationally. These agencies, for a sizeable fee, make all abortion arrangements for a patient. We also learned that certain hospitals give discounts to these lucrative, profit-making organizations. Thus, at the expense of desperate, frightened women these agencies are making a huge profit—some, such a huge profit that our Committee members were actually shocked."

See, *e. g.*, *State* v. *Mitchell*, 66 Misc. 2d 514, 321 N. Y. S. 2d 756 (1971); *State* v. *Abortion Information Agency, Inc.*, 69 Misc. 2d 825, 323 N. Y. S. 2d 597 (1971).

Without denying the power of either New York or Virginia to prohibit advertising such as that in issue where both publication of the advertised activity and the activity itself occur in the same State, the Court instead focuses on the multistate nature of this transaction, concluding that a State "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Ante*, at 824–825. And the Court goes so far as to suggest that it is an open question whether a State may constitutionally prohibit an advertisement containing an invitation or offer to engage in activity which is criminal both in the State of publication and in the proposed situs of the crime. See *ante*, at 828 n. 14.

The source of this rigid territorial limitation on the power of the States in our federal system to safeguard the health and welfare of their citizens is not revealed. It is surely not to be found in cases from this Court.[2]

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[2] The Court, *ante*, at 822–823, relies on *Huntington* v. *Attrill*, 146 U. S. 657, 669 (1892), for its major premise that Virginia could not regulate the relations of the advertiser with its residents since these occurred in New York. To the extent that the Court reads *Huntington* to impose a rigid and unthinking territorial limitation, whose constitutional source is unspecified, on the power of the States to regulate conduct, it is plainly wrong. The passage referred to by the Court in the *Huntington* opinion is dictum and appears to be a statement of then-prevalent common-law rules rather than a constitutional holding. And the attempt to impose such a rigid limitation on the power of the States was first rejected by Mr. Justice Holmes, writing for the Court in *Strassheim* v. *Daily*, 221 U. S. 280, 285 (1911):

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect . . . ."

Mr. Justice McKenna in *Hyde* v. *United States*, 225 U. S. 347, 363 (1912), observed that "this must be so if we would fit the laws

Beginning at least with our decision in *Delamater* v. *South Dakota*, 205 U. S. 93, 100 (1907), we have consistently recognized that irrespective of a State's power to regulate extraterritorial commercial transactions in which its citizens participate it retains an independent power to regulate the business of commercial solicitation and advertising within its borders. Thus, for example, in *Head* v. *New Mexico Board*, 374 U. S. 424 (1963), we upheld the power of New Mexico to prohibit commercial advertising by a New Mexico radio station of optometric services provided in Texas. Mr. JUSTICE BRENNAN, concurring in that opinion, noted that a contrary result might well produce "a 'no-man's land' . . . in which there would be at best selective policing of the various advertising abuses and excesses which are now very extensively regulated by state law." *Id.*, at 446. See, *e. g.*, *Packer Corp.* v. *Utah*, 285 U. S. 105 (1932); *Breard* v. *Alexandria*, 341 U. S. 622 (1951).

Were the Court's statements taken literally, they would presage a standard of the lowest common denominator for commercial ethics and business conduct. Securities issuers could circumvent the established blue-sky laws of States which had carefully drawn such laws for the protection of their citizens by establishing as a situs for transactions those States without such regulations, while spreading offers throughout the country. Loan sharks might well choose States with unregulated small loan industries, luring the unwary with immune

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and their administration to the acts of men and not be led away by mere 'bookish theorick.'" See, *e. g.*, *Skiriotes* v. *Florida*, 313 U. S. 69, 74–75 (1941); *Ford* v. *United States*, 273 U. S. 593, 620–621 (1927). To the extent that the Court's conclusion that Virginia has a negligible interest in its statute proceeds from the assumption that the State was without power to regulate the extraterritorial activities of the advertiser involving Virginia residents, it is quite at war with our prior cases.

commercial advertisements. And imagination would place the only limit on the use of such a "no-man's land" together with artificially created territorial contacts to bilk the public and circumvent long-established state schemes of regulation.

Since the Court saves harmless from its present opinion our prior cases in this area, *ante*, at 825 n. 10, it may be fairly inferred that it does not intend the results which might otherwise come from a literal reading of its opinion. But solely on the facts before it, I think the Court today simply errs in assessing Virginia's interest in its statute because it does not focus on the impact of the practices in question on the State. Cf. *Young* v. *Masci*, 289 U. S. 253 (1933). Although the commercial referral agency, whose advertisement in Virginia was barred, was physically located outside the State, this physical contact says little about Virginia's concern for the touted practices. Virginia's interest in this statute lies in preventing commercial exploitation of the health needs of its citizens. So long as the statute bans commercial advertising by publications within the State, the extraterritorial location at which the services are actually provided does not diminish that interest.

Since the statute in question is a "reasonable regulation that serves a legitimate public interest," *ante*, at 826, I would affirm the judgment of the Supreme Court of Virginia.

UNITED HOUSING FOUNDATION, INC., ET AL. *v.* FORMAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74–157. Argued April 22, 1975—Decided June 16, 1975*

Respondents are 57 residents of Co-op City, a massive cooperative housing project in New York City, organized, financed, and constructed under the New York Private Housing Finance Law (Mitchell-Lama Act). They brought this action on behalf of all the apartment owners and derivatively on behalf of the housing corporation, alleging, *inter alia*, violations of the antifraud provisions of the Securities Act of 1933 and of the Securities Exchange Act of 1934 (hereafter collectively Securities Acts), in connection with the sale to respondents of shares of the common stock of the cooperative housing corporation. Citing substantial increases in the tenants' monthly rental charges as a result of higher construction costs, respondents' claim centered on a Co-op City Information Bulletin issued in the project's initial stages, which allegedly misrepresented that the developers would absorb future cost increases due to such factors as inflation. Under the Mitchell-Lama Act, which was designed to encourage private developers to build low-cost cooperative housing, the State provides large, long-term low-interest mortgage loans and substantial tax exemptions, conditioned on step-by-step state supervision of the cooperative's development. Developers must agree to operate the facilities "on a nonprofit basis" and may lease apartments to only state-approved lessees whose incomes are below a certain level. The corporate petitioners in this case built, promoted, and presently control Co-op City: United Housing Foundation (UHF), a nonprofit membership corporation, initiated and sponsored the project; Riverbay, a nonprofit cooperative housing corporation, was organized by UHF to own and operate the land and buildings and issue the stock that is the subject of the instant action; and Community Securities, Inc. (CSI), UHF's wholly owned subsidiary, was the project's general

*Together with No. 74–647, *New York et al.* v. *Forman et al.*, also on certiorari to the same court.

contractor and sales agent. To acquire a Co-op City apartment a prospective purchaser must buy 18 shares of Riverbay stock for each room desired at $25 per share. The shares cannot be transferred to a nontenant, pledged, encumbered, or bequeathed (except to a surviving spouse), and do not convey voting rights based on the number owned (each apartment having one vote). On termination of occupancy a tenant must offer his stock to Riverbay at $25 per share, and in the unlikely event that Riverbay does not repurchase, the tenant cannot sell his shares for more than their original price, plus a fraction of the mortgage amortization that he has paid during his tenancy, and then only to a prospective tenant satisfying the statutory income eligibility requirements. Under the Co-op City lease arrangement the resident is committed to make monthly rental payments in accordance with the size, nature, and location of the apartment. The Securities Acts define a "security" as "any . . . stock, . . . investment contract, . . . or, in general, any interest or instrument commonly known as a 'security.'" Petitioners moved to dismiss the complaint for lack of federal jurisdiction, maintaining that the Riverbay stock did not constitute securities as thus defined. The District Court granted the motion to dismiss. The Court of Appeals reversed, holding that (1) since the shares purchased were called "stock" the definitional sections of the Securities Acts were literally applicable and (2) the transaction was an investment contract under the Securities Acts, there being a profit expectation from rental reductions resulting from (i) the income produced by commercial facilities established for the use of Co-op City tenants; (ii) tax deductions for the portion of monthly rental charges allocable to interest payments on the mortgage; and (iii) savings based on the fact that Co-op City apartments cost substantially less than comparable nonsubsidized housing. *Held:* The shares of stock involved in this litigation do not constitute "securities" within the purview of the Securities Acts, and since respondents' claims are not cognizable in federal court, the District Court properly dismissed their complaint. Pp. 847–858.

(a) When viewed as they must be in terms of their substance (the economic realities of the transaction) rather than their form, the instruments involved here were not shares of stock in the ordinary sense of conferring the right to receive "dividends contingent upon an apportionment of profits," *Tcherepnin* v. *Knight*, 389 U. S. 332, 339, with the traditional characteristics of being

negotiable, subject to pledge or hypothecation, conferring voting rights proportional to the number of shares owned, and possibility of appreciating in value. On the contrary, these instruments were purchased, not for making a profit, but for acquiring subsidized low-cost housing. Pp. 848–851.

(b) A share in Riverbay does not constitute an "investment contract" as defined by the Securities Acts, a term which, like the term "any . . . instrument commonly known as a 'security,'" involves investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. Here neither of the kinds of profits traditionally associated with securities were offered to respondents; instead, as indicated in the Information Bulletin, which stressed the "non-profit" nature of the project, the focus was upon the acquisition of a place to live. Pp. 851–854.

(c) Although deductible for tax purposes, the portion of rental charges applied to interest on the mortgage (benefits generally available to home mortgagors) does not constitute "profits," and, in any event, does not derive from the efforts of third parties. Pp. 854–855.

(d) Low rent attributable to state financial subsidies no more embodies income or profit attributes than other types of government subsidies. P. 855.

(e) Such income as might derive from Co-op City's leasing of commercial facilities within the housing project to be used to reduce tenant rentals (the prospect of which was never mentioned in the Information Bulletin) is too speculative and insubstantial to bring the entire transaction within the Securities Acts. These facilities were established, not for profit purposes, but to make essential services available to residents of the huge complex. Pp. 855–857.

500 F. 2d 1246, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and WHITE, JJ., joined, *post*, p. 860.

Simon H. Rifkind argued the cause for petitioners in No. 74–157. With him on the briefs was *Martin London*. *Daniel M. Cohen*, Assistant Attorney General of New

York, argued the cause for petitioners in No. 74–647. With him on the briefs were *Louis J. Lefkowitz*, Attorney General, and *Samuel A. Hirshowitz*, First Assistant Attorney General.

Louis Nizer argued the cause for respondents in both cases. With him on the brief were *George Berger*, *Jay F. Gordon*, *Ira B. Rose*, and *Janet P. Kane*.

Paul Gonson argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Bork*, *Lawrence E. Nerheim*, and *Richard E. Nathan*.†

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in these cases is whether shares of stock entitling a purchaser to lease an apartment in Co-op City, a state subsidized and supervised nonprofit housing cooperative, are "securities" within the purview of the Securities Act of 1933 and the Securities Exchange Act of 1934.

I

Co-op City is a massive housing cooperative in New York City. Built between 1965 and 1971, it presently houses approximately 50,000 people on a 200-acre site containing 35 high-rise buildings and 236 town houses. The project was organized, financed, and constructed under the New York State Private Housing Finance Law, commonly known as the Mitchell-Lama Act, enacted to ameliorate a perceived crisis in the availability of decent low-income urban housing. In order to encourage pri-

†*William J. Brown*, Attorney General, *William G. Compton*, Assistant Attorney General, *Jon M. Sebaly*, Special Assistant Attorney General, and *Michael R. Merz* filed a brief for the State of Ohio as *amicus curiae* urging reversal.

vate developers to build low-cost cooperative housing, New York provides them with large long-term, low-interest mortgage loans and substantial tax exemptions. Receipt of such benefits is conditioned on a willingness to have the State review virtually every step in the development of the cooperative. See N. Y. Priv. Hous. Fin. Law §§ 11–37, as amended (1962 and Supp. 1974–1975). The developer also must agree to operate the facility "on a nonprofit basis," § 11–a (2a), and he may lease apartments only to people whose incomes fall below a certain level and who have been approved by the State.[1]

The United Housing Foundation (UHF), a nonprofit membership corporation established for the purpose of "aiding and encouraging" the creation of "adequate, safe and sanitary housing accommodations for wage earners and other persons of low or moderate income," [2] Appendix in Court of Appeals 95a (hereafter App.), was responsible for initiating and sponsoring the development of Co-op City. Acting under the Mitchell-Lama Act, UHF organized the Riverbay Corporation (Riverbay) to own and operate the land and buildings constituting Co-op City. Riverbay, a nonprofit cooperative housing corporation, issued the stock that is the subject of this litigation. UHF also contracted with Community Services, Inc. (CSI), its wholly owned subsidiary, to serve as the general contractor and sales

[1] Eligibility is limited to families whose monthly income does not exceed six times the monthly rental charge (or for families of four or more, seven times the rental charge). N. Y. Priv. Hous. Fin. Law § 31 (2)(a) (Supp. 1974–1975). Preference in admission must be given to veterans, the handicapped, and the elderly. § 31 (7)–(9).

[2] UHF is composed of labor unions, housing cooperatives, and civic groups. It has sponsored the construction of several major housing cooperatives in New York City.

agent for the project.[3] As required by the Mitchell-Lama Act, these decisions were approved by the State Housing Commissioner.

To acquire an apartment in Co-op City an eligible prospective purchaser[4] must buy 18 shares of stock in Riverbay for each room desired. The cost per share is $25, making the total cost $450 per room, or $1,800 for a four-room apartment. The sole purpose of acquiring these shares is to enable the purchaser to occupy an apartment in Co-op City; in effect, their purchase is a recoverable deposit on an apartment. The shares are explicitly tied to the apartment: they cannot be transferred to a nontenant; nor can they be pledged or encumbered; and they descend, along with the apartment, only to a surviving spouse. No voting rights attach to the shares as such: participation in the affairs of the cooperative appertains to the apartment, with the residents of each apartment being entitled to one vote irrespective of the number of shares owned.

Any tenant who wants to terminate his occupancy, or who is forced to move out,[5] must offer his stock to Riverbay at its initial selling price of $25 per share. In the extremely unlikely event that Riverbay declines to repurchase the stock,[6] the tenant cannot sell it for more than

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[3] CSI is a business corporation that has acted as the contractor on several UHF-sponsored housing cooperatives.

[4] Respondents are referred to herein variously as "purchasers," "owners," or "tenants." Respondents do not hold legal title to their respective apartments, but they are purchasers and owners of the shares of Riverbay which entitles them to occupy the apartments. By virtue of their right of occupancy, respondents are usually described as tenants.

[5] A tenant can be forced to move out if he violates the provisions of his "occupancy agreement," which is essentially a lease for the apartment, or if his income grows to exceed the eligibility standards.

[6] To date every family that has withdrawn from Co-op City has received back its initial payment in full. Indeed, at the time this

the initial purchase price plus a fraction of the portion of the mortgage that he has paid off, and then only to a prospective tenant satisfying the statutory income eligibility requirements. See N. Y. Priv. Hous. Fin. Law § 31–a (Supp. 1974–1975).

In May 1965, subsequent to the completion of the initial planning, Riverbay circulated an Information Bulletin seeking to attract tenants for what would someday be apartments in Co-op City. After describing the nature and advantages of cooperative housing generally and of Co-op City in particular, the Bulletin informed prospective tenants that the total estimated cost of the project, based largely on an anticipated construction contract with CSI, was $283,695,550. Only a fraction of this sum, $32,795,550, was to be raised by the sale of shares to tenants. The remaining $250,900,000 was to be financed by a 40-year low-interest mortgage loan from the New York Private Housing Finance Agency. After construction of the project the mortgage payments and current operating expenses would be met by monthly rental charges paid by the tenants. While these rental charges were to vary, depending on the size, nature, and location of an apartment, the 1965 Bulletin estimated that the "average" monthly cost would be $23.02 per room, or $92.08 for a four-room apartment.

Several times during the construction of Co-op City, Riverbay, with the approval of the State Housing Commissioner, revised its contract with CSI to allow for increased construction costs. In addition, Riverbay incurred other expenses that had not been reflected in the

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suit was filed there were 7,000 families on the waiting list for apartments in this cooperative. In addition, a special fund of nearly $1 million had been established by small monthy contributions from all tenants to insure that those wanting to move out would receive full compensation for their shares.

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1965 Bulletin. To meet these increased expenditures, Riverbay, with the Commissioner's approval, repeatedly secured increased mortgage loans from the State Housing Agency. Ultimately the construction loan was $125 million more than the figure estimated in the 1965 Bulletin. As a result, while the initial purchasing price remained at $450 per room, the average monthly rental charges increased periodically, reaching a figure of $39.68 per room as of July 1974.[7]

These increases in the rental charges precipitated the present lawsuit. Respondents, 57 residents of Co-op City, sued in federal court on behalf of all 15,372 apartment owners, and derivatively on behalf of Riverbay, seeking upwards of $30 million in damages, forced rental reductions, and other "appropriate" relief. Named as defendants (petitioners herein) were UHF, CSI, Riverbay, several individual directors of these organizations, the State of New York, and the State Private Housing Finance Agency. The heart of respondents' claim was that the 1965 Co-op City Information Bulletin falsely represented that CSI would bear all subsequent cost increases due to factors such as inflation. Respondents further alleged that they were misled in their purchases of shares since the Information Bulletin failed to disclose several critical facts.[8] On these bases,

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[7] As the rental charges increased, the income eligibility requirements for residents of Co-op City expanded accordingly. See n. 1, *supra*.

[8] Respondents maintained that the following material facts were omitted: (i) the original estimated cost had never been adhered to in any of the previous Mitchell-Lama projects sponsored by UHF and built by CSI; (ii) petitioners knew that the initial estimate would not be followed in the present project; (iii) CSI was a wholly owned subsidiary of UHF; (iv) CSI's net worth was so small that it could not have been legally held to complete the contract within the original estimated costs; (v) the State Housing Commissioner

respondents asserted two claims under the fraud provisions of the federal Securities Act of 1933, as amended, § 17 (a), 48 Stat. 84, 15 U. S. C. § 77q (a); the Securities Exchange Act of 1934, as amended, § 10 (b), 48 Stat. 891, 15 U. S. C. § 78j (b); and 17 CFR § 240.10b–5 (1975). They also presented a claim against the State Financing Agency under the Civil Rights Act of 1871, 42 U. S. C. § 1983, and 10 pendent state-law claims.

Petitioners, while denying the substance of these allegations,[9] moved to dismiss the complaint on the ground that federal jurisdiction was lacking. They maintained that shares of stock in Riverbay were not "securities" within the definitional sections of the federal Securities Acts. In addition, the state parties moved to dismiss on sovereign immunity grounds.

The District Court granted the motion to dismiss. *Forman* v. *Community Services, Inc.*, 366 F. Supp. 1117 (SDNY 1973). It held that the denomination of the shares in Riverbay as "stock" did not, by itself, make them securities under the federal Acts. The court further ruled, relying primarily on this Court's decisions in *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), and *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), that the purchase in issue was not a security transaction since it was not induced by an offer of tangible material profits, nor could such profits realistically be expected. In the District Court's words, it was

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had waived his own rule regarding liquidity requirements in approving CSI as the contractor; and (vi) there was an additional undisclosed contract between CSI and Riverbay.

[9] Petitioners asserted that the Information Bulletin warned purchasers of the possibility of rental increases, and denied that it omitted material facts. They also argued that prior to occupancy all tenants were informed that rental charges had increased. In any event, petitioners claimed that respondents have suffered no damages since they may move out and retrieve their initial investments in full.

"the fundamental nonprofit nature of this transaction" which presented "the insurmountable barrier to [respondents'] claims in th[e] federal court." 366 F. Supp., at 1128.[10]

The Court of Appeals for the Second Circuit reversed. *Forman* v. *Community Services, Inc.*, 500 F. 2d 1246 (1974). It rested its decision on two alternative grounds. First, the court held that since the shares purchased were called "stock" the Securities Acts, which explicitly include "stock" in their definitional sections, were literally applicable. Second, the Court of Appeals concluded that the transaction was an investment contract within the meaning of the Acts and as defined by *Howey*, since there was an expectation of profits from three sources: (i) rental reductions resulting from the income produced by the commercial facilities established for the use of tenants at Co-op City; (ii) tax deductions for the portion of the monthly rental charges allocable to interest payments on the mortgage; and (iii) savings based on the fact that apartments at Co-op City cost substantially less than comparable nonsubsidized housing. The court further ruled that the immunity claims by the state parties were unavailing.[11] Accordingly, the

[10] The District Court also dismissed the § 1983 claim finding that the "federal securities allegations represent the only well-pleaded underlying basis for jurisdiction under the Civil Rights Act." 366 F. Supp. 1117, 1132 (1973). In view of these rulings the court did not reach the sovereign immunity claims.

[11] The Court of Appeals held that the state agency was independent and distinct from the State itself and therefore was a "person" for purposes of § 1983, that both the agency and the State had waived immunity under § 32 (5) of the Private Housing Finance Law, and that the State had also implicitly waived its immunity by voluntarily participating in the sale of securities, an area subject to plenary federal regulation. See *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). In view of our disposition of these cases we do not reach these issues.

case was remanded to the District Court for consideration of respondents' claims on the merits.

In view of the importance of the issues presented we granted certiorari. 419 U. S. 1120 (1975). As we conclude that the disputed transactions are not purchases of securities within the contemplation of the federal statutes, we reverse.

II

Section 2 (1) of the Securities Act of 1933, 15 U. S. C. § 77b (1), defines a "security" as

> "any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." [12]

In providing this definition Congress did not attempt to articulate the relevant economic criteria for distinguishing "securities" from "non-securities." Rather, it sought to define "the term 'security' in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world

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[12] The definition of a security in § 3 (a) (10) of the 1934 Act, 15 U. S. C. § 78c (a) (10), is virtually identical and, for present purposes, the coverage of the two Acts may be considered the same. See *Tcherepnin* v. *Knight*, 389 U. S. 332, 336, 342 (1967); S. Rep. No. 792, 73d Cong., 2d Sess., 14 (1934).

fall within the ordinary concept of a security." H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933). The task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society come within the coverage of these statutes.

In making this determination in the present case we do not write on a clean slate. Well-settled principles enunciated by this Court establish that the shares purchased by respondents do not represent any of the "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," *Howey*, 328 U. S., at 299, and therefore do not fall within "the ordinary concept of a security."

A

We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called "stock," [13] must be considered a security transaction simply because the statutory definition of a security includes the words "any . . . stock." Rather we adhere to the basic principle that has guided all of the Court's decisions in this area:

> "[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967).

See also *Howey*, *supra*, at 298.

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[13] While the record does not indicate precisely why the term "stock" was used for the instant transaction, it appears that this form is generally used as a matter of tradition and convenience. See P. Rohan & M. Reskin, Cooperative Housing Law & Practice § 2.01 (4) (1973).

The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors. Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto. Thus, in construing these Acts against the background of their purpose, we are guided by a traditional canon of statutory construction:

> "[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892).

See also *United States* v. *American Trucking Assns.*, 310 U. S. 534, 543 (1940).[14]

Respondents' reliance on *Joiner* as support for a "literal approach" to defining a security is misplaced. The issue in *Joiner* was whether assignments of interests in oil leases, coupled with the promoters' offer to drill an exploratory well, were securities. Looking to the economic

[14] With the exception of the Second Circuit, every Court of Appeals recently to consider the issue has rejected the literal approach urged by respondents. See *C. N. S. Enterprises, Inc.* v. *G. & G. Enterprises, Inc.*, 508 F. 2d 1354 (CA7 1975); *McClure* v. *First National Bank of Lubbock*, 497 F. 2d 490 (CA5 1974), cert. denied, 420 U. S. 930 (1975); *Lino* v. *City Investing Co.*, 487 F. 2d 689 (CA3 1973). See also 1 L. Loss, Securities Regulation 493 (2d ed. 1961) ("substance governs rather than form: . . . just as some things which look like real estate are securities, some things which look like securities are real estate").

inducement provided by the proposed exploratory well, the Court concluded that these leases were securities even though "leases" as such were not included in the list of instruments mentioned in the statutory definition. In dictum the Court noted that "[i]nstruments *may* be included within [the definition of a security], as [a] matter of law, if on their face they answer to the name or description." 320 U. S., at 351 (emphasis supplied). And later, again in dictum, the Court stated that a security "*might*" be shown "by proving the document itself, which on its face would be a note, a bond, or a share of stock." *Id.*, at 355 (emphasis supplied). By using the conditional words "may" and "might" in these dicta the Court made clear that it was not establishing an inflexible rule barring inquiry into the economic realities underlying a transaction. On the contrary, the Court intended only to make the rather obvious point that, in contrast to the instrument before it which was not included within the explicit statutory terms, most instruments bearing these traditional titles are likely to be covered by the statutes.[15]

In holding that the name given to an instrument is not dispositive, we do not suggest that the name is wholly irrelevant to the decision whether it is a security. There may be occasions when the use of a traditional name such as "stocks" or "bonds" will lead a purchaser justifiably to assume that the federal securities laws apply.

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[15] Nor can respondents derive any support for a literal approach from *Tcherepnin* v. *Knight*, *supra*, which quoted the *Joiner* dictum. Indeed in *Tcherepnin* the Court explicitly stated that "form should be disregarded for substance," 389 U. S., at 336, and only after analyzing the economic realities of the transaction at issue did it conclude that an instrument called a "withdrawable capital share" was, in substance, an "investment contract," a share of "stock," a "certificate of interest or participation in [a] profit-sharing agreement," and a "transferable share."

This would clearly be the case when the underlying transaction embodies some of the significant characteristics typically associated with the named instrument.

In the present case respondents do not contend, nor could they, that they were misled by use of the word "stock" into believing that the federal securities laws governed their purchase. Common sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock. These shares have none of the characteristics "that in our commercial world fall within the ordinary concept of a security." H. R. Rep. No. 85, *supra*, at 11. Despite their name, they lack what the Court in *Tcherepnin* deemed the most common feature of stock: the right to receive "dividends contingent upon an apportionment of profits." 389 U. S., at 339. Nor do they possess the other characteristics traditionally associated with stock: they are not negotiable; they cannot be pledged or hypothecated; they confer no voting rights in proportion to the number of shares owned; and they cannot appreciate in value. In short, the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit.

B

The Court of Appeals, as an alternative ground for its decision, concluded that a share in Riverbay was also an "investment contract" as defined by the Securities Acts. Respondents further argue that in any event what they agreed to purchase is "commonly known as a 'security' " within the meaning of these laws. In considering these claims we again must examine the substance—the economic realities of the transaction—rather than the

names that may have been employed by the parties. We perceive no distinction, for present purposes, between an "investment contract" and an "instrument commonly known as a 'security.'" In either case, the basic test for distinguishing the transaction from other commercial dealings is

> "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U. S., at 301.[16]

This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. By profits, the Court has meant either capital appreciation resulting from the development of the initial investment, as in *Joiner, supra* (sale of oil leases conditioned on promoters' agreement to drill exploratory well), or a participation in earnings resulting from the use of investors' funds, as in *Tcherepnin* v. *Knight, supra* (dividends on the investment based on savings and loan association's profits). In such cases the investor is "attracted solely by the prospects of a return" on his investment. *Howey, supra*, at 300. By contrast, when a purchaser is motivated by a

[16] This test speaks in terms of "profits to come *solely* from the efforts of others." (Emphasis supplied.) Although the issue is not presented in this case, we note that the Court of Appeals for the Ninth Circuit has held that "the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities." *SEC* v. *Glenn W. Turner Enterprises*, 474 F. 2d 476, 482, cert. denied, 414 U. S. 821 (1973). We express no view, however, as to the holding of this case.

desire to use or consume the item purchased—"to occupy the land or to develop it themselves," as the *Howey* Court put it, *ibid.*—the securities laws do not apply.[17] See also *Joiner, supra.*[18]

In the present case there can be no doubt that investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments. The Information Bulletin distributed to prospective residents emphasized the fundamental nature and purpose of the undertaking:

> "A cooperative is a non–profit enterprise owned and controlled democratically by its members—the people who are using its services. . . .
>
> . . . . . .
>
> "People find living in a cooperative community enjoyable for more than one reason. Most people join, however, for the simple reason that it is a way to obtain decent housing at a reasonable price.

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[17] In some transactions the investor is offered both a commodity or real estate for use and an expectation of profits. See SEC Release No. 33–5347, 38 Fed. Reg. 1735 (Jan. 18, 1973). See generally Rohan, The Securities Law Implications of Condominium Marketing Programs Which Feature a Rental Agency or Rental Pool, 2 Conn. L. Rev. 1 (1969). The application of the federal securities laws to these transactions may raise difficult questions that are not present in this case.

[18] In *Joiner*, 320 U. S., at 348, the Court stated:

"Undisputed facts seem to us, however, to establish the conclusion that defendants were not, as a practical matter, offering naked leasehold rights. Had the offer mailed by defendants omitted the economic inducements of the proposed and promised exploration well, it would have been a quite different proposition."

This distinction was critical because the exploratory drillings gave the investments "most of their value and all of their lure." *Id.*, at 349. The land itself was purely an incidental consideration in the transaction.

> However, there are other advantages. The purpose of a cooperative is to provide home ownership, not just apartments to rent. The community is designed to provide a favorable environment for family and community living. . . .
>
> "The common bond of collective ownership which you share makes living in a cooperative different. It is a community of neighbors. Home ownership, common interests and the community atmosphere make living in a cooperative like living in a small town. As a rule there is very little turnover in a cooperative." App. 162a, 166a.

Nowhere does the Bulletin seek to attract investors by the prospect of profits resulting from the efforts of the promoters or third parties. On the contrary, the Bulletin repeatedly emphasizes the "nonprofit" nature of the endeavor. It explains that if rental charges exceed expenses the difference will be returned as a rebate, not invested for profit. It also informs purchasers that they will be unable to resell their apartments at a profit since the apartment must first be offered back to Riverbay "at the price . . . paid for it." [19] *Id.*, at 163a. In short, neither of the kinds of profits traditionally associated with securities was offered to respondents.

The Court of Appeals recognized that there must be an expectation of profits for these shares to be securities, and conceded that there is "no possible profit on a resale of [this] stock." 500 F. 2d, at 1254. The court cor-

[19] This requirement effectively insures that no apartment will be sold for more than its original cost. Consonant with the purposes of the Mitchell-Lama Act, whenever there are prospective buyers willing to pay as much as the initial purchase price for an apartment in Co-op City, Riverbay will repurchase the apartment and resell it at its original cost. See App. 138a. If, for some reason, Riverbay does not purchase the apartment the tenant still cannot make a profit on his sale. See *supra*, at 842–843.

rectly noted, however, that profit may be derived from the income yielded by an investment as well as from capital appreciation, and then proceeded to find "an expectation of 'income' in at least three ways." *Ibid.* Two of these supposed sources of income or profits may be disposed of summarily. We turn first to the Court of Appeals' reliance on the deductibility for tax purposes of the portion of the monthly rental charge applied to interest on the mortgage. We know of no basis in law for the view that the payment of interest, with its consequent deductibility for tax purposes, constitutes income or profits.[20] These tax benefits are nothing more than that which is available to any homeowner who pays interest on his mortgage. See § 216 of Internal Revenue Code, 26 U. S. C. § 216; *Eckstein* v. *United States,* 196 Ct. Cl. 644, 452 F. 2d 1036 (1971).

The Court of Appeals also found support for its concept of profits in the fact that Co-op City offered space at a cost substantially below the going rental charges for comparable housing. Again, this is an inappropriate theory of "profits" that we cannot accept. The low rent derives from the substantial financial subsidies provided by the State of New York. This benefit cannot be liquidated into cash; nor does it result from the managerial efforts of others. In a real sense, it no more embodies the attributes of income or profits than do welfare benefits, food stamps, or other government subsidies.

The final source of profit relied on by the Court of Appeals was the possibility of net income derived from the leasing by Co-op City of commercial facilities, pro-

[20] Even if these tax deductions were considered profits, they would not be the type associated with a security investment since they do not result from the managerial efforts of others. See Rosenbaum, The Resort Condominium and the Federal Securities Laws—A Case Study in Governmental Inflexibility, 60 Va. L. Rev. 785, 795–796 (1974); Note, 62 Geo. L. J. 1515, 1524–1526 (1974).

fessional offices and parking spaces, and its operation of community washing machines. The income, if any, from these conveniences, all located within the common areas of the housing project, is to be used to reduce tenant rental costs. Conceptually, one might readily agree that net income from the leasing of commercial and professional facilities is the kind of profit traditionally associated with a security investment.[21] See *Tcherepnin* v. *Knight, supra.* But in the present case this income—if indeed there is any—is far too speculative and insubstantial to bring the entire transaction within the Securities Acts.

Initially we note that the prospect of such income as a means of offsetting rental costs is never mentioned in the Information Bulletin. Thus it is clear that investors were not attracted to Co-op City by the offer of these potential rental reductions. See *Joiner,* 320 U. S., at 353. Moreover, nothing in the record suggests that the facilities in fact return a profit in the sense that the leasing fees are greater than the actual cost to Co-op City of the space rented.[22] The short of the matter is

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[21] The "income" derived from the rental of parking spaces and the operation of washing machines clearly was not profit for respondents since these facilities were provided exclusively for the use of tenants. Thus, when the income collected from the use of these facilities exceeds the cost of their operation the tenants simply receive the return of the initial overcharge in the form of a rent rebate. Indeed, it could be argued that the "income" from the commercial and professional facilities is also, in effect, a rebate on the cost of goods and services purchased at these facilities since it appears likely that they are patronized almost exclusively by Co-op City residents. See Note, 53 Tex. L. Rev. 623, 630–631, n. 38 (1975).

[22] The Court of Appeals quoted the gross rental income received from these facilities. But such figures by themselves are irrelevant since the record does not indicate the cost to Co-op City of providing and maintaining the rented space.

that the stores and services in question were established not as a means of returning profits to tenants, but for the purpose of making essential services available for the residents of this enormous complex.[23] By statute these facilities can only be "incidental and appurtenant" to the housing project. N. Y. Priv. Hous. Fin. Law § 12 (5) (Supp. 1974–1975). Undoubtedly they make Co-op City a more attractive housing opportunity, but the possibility of some rental reduction is not an "expectation of profit" in the sense found necessary in *Howey*.[24]

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[23] See generally Miller, Cooperative Apartments: Real Estate or Securities?, 45 B. U. L. Rev. 465, 500 (1965).

[24] Respondents urge us to abandon the element of profits in the definition of securities and to adopt the "risk capital" approach articulated by the California Supreme Court in *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P. 2d 906 (1961). Cf. *El Khadem* v. *Equity Securities Corp.*, 494 F. 2d 1224 (CA9), cert. denied, 419 U. S. 900 (1974). See generally Coffey, The Economic Realities of a "Security": Is There a More Meaningful Formula?, 18 W. Res. L. Rev. 367 (1967); Long, An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation, 24 Okla. L. Rev. 135 (1971); Hannan & Thomas, The Importance of Economic Reality and Risk in Defining Federal Securities, 25 Hastings L. J. 219 (1974). Even if we were inclined to adopt such a "risk capital" approach we would not apply it in the present case. Purchasers of apartments in Co-op City take no risk in any significant sense. If dissatisfied with their apartments, they may recover their initial investment in full. See n. 5, *supra*.

Respondents assert that if Co-op City becomes bankrupt they stand to lose their whole investment. But, in view of the fact that the State has financed over 92% of the cost of construction and carefully regulates the development and operation of the project, bankruptcy in the normal sense is an unrealistic possibility. In any event, the risk of insolvency of an ongoing housing cooperative "differ[s] vastly" from the kind of risk of "fluctuating" value associated with securities investments. *SEC* v. *Variable Annuity Co.*, 359 U. S. 65, 90–91 (1959) (BRENNAN, J., concurring). See Hannan & Thomas, *supra*, at 242–249; Long, Introduction to Symposium: Interpreting the Statutory Definition of a Security: Some Pragmatic Considerations, 6 St. Mary's L. J. 96, 126–128 (1974).

There is no doubt that purchasers in this housing cooperative sought to obtain a decent home at an attractive price. But that type of economic interest characterizes every form of commercial dealing. What distinguishes a security transaction—and what is absent here—is an investment where one parts with his money in the hope of receiving profits from the efforts of others, and not where he purchases a commodity for personal consumption or living quarters for personal use.[25]

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[25] The SEC has filed an *amicus curiae* brief urging us to hold the federal securities laws applicable to this case. Traditionally the views of an agency charged with administering the governing statute would be entitled to considerable weight. See, *e. g.*, *Saxbe* v. *Bustos*, 419 U. S. 65, 74 (1974); *Investment Company Institute* v. *Camp*, 401 U. S. 617, 626–627 (1971). But in this case the SEC's position flatly contradicts what appears to be a rather careful statement of the Commission's views in a recent release. In Release No. 33–5347, 38 Fed. Reg. 1735 (Jan. 18, 1973), applicable to the "sale of condominium units, or other units in a real estate development," the SEC stated its view that only those real estate investments that are "offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of the promoter, or a third party designated or arranged for by the promoter," are to be considered securities. *Id.*, at 1736. In particular, the Commission explained that the Securities Acts do not apply when "commercial facilities are a part of the common elements of a residential project" if

"(a) the income from such facilities is used only to offset common area expenses and (b) the operation of such facilities is incidental to the project as a whole and are not established as a primary income source for the individual owners of a condominium or cooperative unit." *Ibid.*

See also SEC Real Estate Advisory Committee Report 74–91 (1972); Dickey & Thorpe, Federal Security Regulation of Condominium Offerings, 19 N. Y. L. F. 473 (1974).

Several commentators have noted the inconsistency between the SEC's position in the above release and the decision by the Court of Appeals in this case, which the SEC now supports. See Berman & Stone, Federal Securities Law and the Sale of Condominiums,

III

In holding that there is no federal jurisdiction, we do not address the merits of respondents' allegations of fraud. Nor do we indicate any view as to whether the type of claims here involved should be protected by federal regulation.[26] We decide only that the type of

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Homes, and Homesites, 30 Bus. Law. 411, 420–425 (1975); Comment, Condominium Regulation: Beyond Disclosure, 123 U. Pa. L. Rev. 639, 654–655 (1975); Note, *supra*, n. 20, at 628. In view of this unexplained contradiction in the Commission's position we accord no special weight to its views. See *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418, 426 (1972); *Blue Chip Stamps* v. *Manor Drug Stores*, *ante*, at 746–747, n. 10.

[26] It has been suggested that the sale of housing developments such as condominiums and cooperatives is in need of federal regulation and therefore the securities laws should be construed or amended to reach these transactions. See, *e. g.*, Note, Federal Securities Regulation of Condominiums: A Purchaser's Perspective, 62 Geo. L. J. 1403 (1974); Note, Cooperative Housing Corporations and the Federal Securities Laws, 71 Col. L. Rev. 118 (1971). Others have disagreed, claiming that the extensive body of regulation developed over more than four decades under these Acts would be inappropriate and unduly costly to the sellers and buyers of residential housing. See Berman & Stone, *supra*, n. 24; Note, *supra*, n. 20. Moreover, extension of the securities laws to real estate transactions would involve important questions as to the appropriate balance between state and federal responsibility. The determination of whether and in what manner federal regulation may be required for housing transactions, where the characteristics of an investment in securities are not present, is better left to the Congress, which can assess both the costs and benefits of any such regulation. Indeed only recently Congress instructed the Secretary of Housing and Urban Development "to conduct a full and complete investigation and study . . . with respect to . . . the problems, difficulties, and abuses or potential abuses applicable to condominium and cooperative housing." § 821, 88 Stat. 740, 42 U. S. C. § 3532 (1970 ed., Supp. IV). See also Real Estate Settlement Procedures Act of 1974, 88 Stat. 1724, 12 U. S. C. § 2601 *et seq.* (1970 ed., Supp. IV); Interstate Land Sales Full Disclosure Act, 82 Stat. 590, 15 U. S. C. §§ 1701–1720.

transaction before us, in which the purchasers were interested in acquiring housing rather than making an investment for profit, is not within the scope of the federal securities laws.

Since respondents' claims are not cognizable in federal court, the District Court properly dismissed their complaint.[27] The judgment below is therefore

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE join, dissenting.

I dissent. The property interests here are "securities," in my view, both because they are shares of "stock" and because they are "investment contracts."

I

Both the Securities Act of 1933, 15 U. S. C. § 77b (1), and the Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(10), define the term "security" as including, among other things, an "investment contract." The essential ingredients of an investment contract have been clear since *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 301 (1946), held that "[t]he test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." See *Tcherepnin* v. *Knight*, 389 U. S. 332, 338 (1967). There is no doubt that Co-op City residents invested money in a common enterprise; the only questions in-

[27] Besides the Securities Acts claims, respondents also included a vague and conclusory allegation under 42 U. S. C. § 1983 against petitioner New York State Housing Finance Agency. We agree with the District Court that this count must also be dismissed. See n. 9, *supra*. The remaining counts in the complaint were all predicated on alleged violations of state law not independently cognizable in federal court.

volve whether the investment was to be productive of "profits to come solely from the efforts of others."

The record discloses little of the activities of Riverbay Corporation, the owner and operator of Co-op City, as a lessor of commercial and office space. It does appear, however, that revenues well in excess of $1 million per year flow into the corporation from such activities, Appendix in Court of Appeals 361a (hereafter App.), a fact noted by the Court of Appeals. 500 F. 2d 1246, 1254 (CA2 1974). Even after deduction of expenses—taxes alone take half of the gross—the residue could hardly be *de minimis*, even for an operation as large as Co-op City. Therein lies the patent fallacy of the Court's conclusion that this aspect of the corporation's activities is "speculative and insubstantial." *Ante*, at 856. The District Court rightly recognized that management by third parties is essential in a project so massive as Co-op City. 366 F. Supp. 1117, 1128 (SDNY 1973). Co-op City residents as stockholders were thus necessarily bound to rely on the management of Riverbay Corporation to produce income in the form of rents from the commercial and office space made an integral part of the project.

As stockholders, Co-op City residents also necessarily relied on corporate management to build and operate the facility efficiently to the end that monthly charges would be minimized. The Court of Appeals held that profits were involved partly because Co-op City offered housing at bargain prices. 500 F. 2d, at 1254. The Court substitutes its own judgment in holding that "[t]he low rent derives from the substantial financial subsidies provided by the State of New York." *Ante*, at 855. It is simple common sense that management efficiency necessarily enters into the equation in the determination of the charges assessed against residents. But even to the extent that the resident-stockholders do benefit in re-

duced charges from government subsidies, the benefit is not for this reason any the less a profit to them. The welfare benefits to which the Court refers, *ante*, at 855, may also be profits, but those profits lack the essential ingredient of profits present here that "come solely from the efforts of others." Here the resident investors utilize the efforts of others to obtain government subsidies. Investors in Wall Street who do this every day will be surprised to learn that the benefits so obtained are not considered profits.

The Court of Appeals also relied on the tax deductibility accorded to portions of the monthly carrying charges paid by Co-op City residents as a source of profit to them. 500 F. 2d, at 1254. The Court rejects this argument with the statement that "[t]hese tax benefits are nothing more than that which is available to any homeowner . . . ." *Ante*, at 855. This is true but irrelevant to the question whether they constitute profits that "come solely from the efforts of others." The special federal tax provision for cooperative owners, 26 U. S. C. § 216, was intended "to place the tenant stockholders of a cooperative apartment in the same position as the owner of a dwelling house so far as deductions for interest and taxes are concerned." S. Rep. No. 1631, 77th Cong., 2d Sess., 51 (1942). This tax benefit constitutes a profit both for the individual homeowners and for the "tenant stockholders of a cooperative apartment." The difference is that the profit of the individual homeowner does not "come solely from the efforts of others," whereas the profit from this source realized by a resident of Co-op City does. Setting up and operating a corporation so as to take advantage of special tax provisions is a project requiring specialized skills. If the arrangements go awry the residents can find themselves without the hoped-for tax advantages.

See, *e. g.*, *Eckstein* v. *United States*, 196 Ct. Cl. 644, 452 F. 2d 1036 (1971). Thus, the investors must depend upon the "efforts of others," here Co-op City's management, properly to organize and operate the project to realize the tax advantage for them.

In *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344 (1943), the investment was in oil leases. In *Howey* it involved citrus groves. Though taxation was not a factor in the Court's disposition of those cases, each of those investments was of a type offering tax advantages as a principal attraction to the investor. Cunnane, Tax Shelter Investments After the 1969 Tax Reform Act, 49 Taxes 450 (1971). It is no answer that the individual investor could have obtained the same tax advantages by purchasing an entire citrus business or by becoming an independent oil operator. He could, but if he did his profits from tax advantages would not then "come solely from the efforts of others." It is only when he relies on third parties to produce the profits for him that, as here, the question of investment contract analysis arises.

Besides its express rejection of each of the forms of profit found by the Court of Appeals, the Court must surprise knowledgeable economists with its proposition, *ante*, at 852, that profits cannot assume forms other than appreciation of capital or participation in earnings.[1] All of the varieties of profit involved here accrue to the resident-stockholders in the form of money saved rather than money earned.[2] Not only would simple common sense teach that the two are the same, but a more sophisticated economic analysis also compels the conclusion that in a practical world there is no difference between

[1] See P. Samuelson, Economics 618–626 (9th ed. 1973).

[2] Apparently there is at least a possibility that dividends could be paid to shareholders, but these would really just be partial refunds of money already paid in which was not needed.

the two forms of income.[3] The investor finds no reason to distinguish, for example, between tax savings and after-tax income. Under a statute having as one of its "central purposes" "to protect investors," *Tcherepnin*, 389 U. S., at 336, it is obvious that the Court errs in distinguishing among types of economic inducements which have no bearing on the motives of investors. Construction of the statute in terms of economic reality is more faithful to its "central" purpose "to protect investors."

There can be no doubt that one of the inducements to the resident-stockholders to purchase a Co-op City apartment was the prospect of profits in one or more of the forms I have discussed. The fact that literature encouraging purchase mentioned some is important, although not conclusive, evidence. See *Joiner*, *supra*, at 353. The Information Bulletins, while not mentioning income from commercial and office space as an advantage of stock ownership, did emphasize the "reasonable price" of the housing, App. 166a, 187a, and they asserted that "every effort" would be made to keep monthly carrying charges low, *id.*, at 174a, 194a. Tax benefits were also discussed as an advantage of ownership, though of course no guarantee of favorable federal and state tax treatment was made. *Id.*, at 175a, 195a.

I do not deny that there are some limits to the broad statutory definition of a security, and the Court's distinction between securities and consumer goods is not frivolous. *Ante*, at 858. But the distinction is not useful in the resolution of the question before us. Of course, the purchase of the stock to get an apartment involves an element of consumption, but it also involves an element of investment. The variable annuity contract con-

[3] See, *e. g.*, P. Samuelson, *supra*, n. 1, at 435; Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

sidered in *SEC* v. *Variable Annuity Co.*, 359 U. S. 65 (1959), presented a not irrelevant analogous situation. What was purchased, after all, was expressly labeled "stock." In any event, what was purchased constituted an "investment contract," within *Howey*, for resident-stockholders of Co-op City invested "in a common enterprise with profits to come solely from the efforts of others." They therefore were purchasing securities within the purview of the Securities Act of 1933 and the Securities Exchange Act of 1934.

II

Moreover, both statutes define the term "security" to include "stock." Therefore, coverage under the statutes is clear under the Court's holding in *Joiner* that "[i]nstruments may be included within any of these definitions, as matter of law if on their face they answer to the name or description." 320 U. S., at 351; see *Tcherepnin*, 389 U. S., at 339. "Security" was broadly defined with the explicit object of including "the many types of instruments that in our commercial world fall within the ordinary concept of a security," H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933). Stock is therefore included because instruments "such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well-settled meaning." *Joiner*, 320 U. S., at 351. Even if this principle nevertheless allows room for exception of some instruments labeled "stock," the Court's justification for excepting the stock involved in this case is singularly unpersuasive. The Court states that "[c]ommon sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is

evidenced by something called a share of stock." *Ante*, at 851. But even informed commentators have expressed misgivings about this question.[4] Thus the Court's justification departs unacceptably from the principle of *Joiner* that "[i]n the enforcement of an act such as this it is not inappropriate that promoters' offerings be judged as being what they were represented to be." 320 U. S., at 353.

While the absence in the case of Co-op City stock of some features normally associated with stock is a relevant consideration, the presence of the attributes that led me to conclude that this stock constitutes an "investment contract," leads me also to conclude that it is a "stock" for purposes of the two statutes. Cf. *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128 (1972).

In sum, I conclude that the interests purchased by the stockholders here were "securities" both because they were "stock" and because they were "investment contracts." [5] In my view therefore the Court of Appeals correctly held that the District Court erred in dismissing this suit.[6]

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[4] See, *e. g.*, 1 L. Loss, Securities Regulation 492–493 (2d ed. 1961).

[5] Accordingly, I have no occasion to examine the "risk capital" approach of *Silver Hills Country Club* v. *Sobieski*, 55 Cal. 2d 811, 361 P. 2d 906 (1961), to determine whether that would lead to the same result.

[6] Petitioners in No. 74–647, the State of New York and the New York State Housing Finance Agency, argue that respondents' suit against them is barred by the Eleventh Amendment. The Court finds it unnecessary to deal with this contention, but my conclusion requires that I answer the Eleventh Amendment defense. The Court of Appeals found no Eleventh Amendment bar here, and I am in agreement with this result.

The Housing Finance Agency is a "public benefit corporation" under New York law, N. Y. Priv. Hous. Fin. Law § 43 (1) (1962 and Supp. 1974–1975), empowered "[t]o sue and be sued," § 44 (1). The agency is authorized to accept funds from the State, the Fed-

III

At oral argument, petitioner United Housing Foundation contended strenuously that comprehensive state participation and regulation of the construction and operation of Co-op City constituted Riverbay Corporation not a capitalistic enterprise but a beneficial public housing enterprise, created by a partnership of public and private groups for the benefit of people of modest incomes. I need not disagree with this characterization to conclude that nevertheless there is a role for the fed-

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eral Government, or "any other source," § 44 (16), but it also is empowered to issue notes, bonds, or other obligations to obtain financing, §§ 44 (7) and 46. Significantly, the State is not liable on the agency's notes or bonds, and such obligations do not constitute debts of the State. § 46 (8). The agency is therefore not an "alter ego" of the State; rather it is an independent body not entitled to assert the Eleventh Amendment. See *Cowles* v. *Mercer County*, 7 Wall. 118 (1869); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 690 (2d ed. 1973). Compare *Matherson* v. *Long Island State Park Comm'n*, 442 F. 2d 566 (CA2 1971), and *Zeidner* v. *Wulforst*, 197 F. Supp. 23, 25 (EDNY 1961), with *Whitten* v. *State University Construction Fund*, 493 F. 2d 177 (CA1 1974), and *Charles Simkin & Sons, Inc.* v. *State University Construction Fund*, 352 F. Supp. 177 (SDNY), aff'd mem., 486 F. 2d 1393 (CA2 1973).

The State of New York, unlike the agency, may assert the Eleventh Amendment, but it has consented to suit. "With regard to duties and liabilities arising out of this article the state, the commissioner or the supervising agency may be sued *in the same manner as a private person.*" N. Y. Priv. Hous. Fin. Law § 32 (5) (emphasis added). To be sure, state waiver statutes are to be strictly construed, and they do not necessarily indicate consent to suit in federal court. See *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U. S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47 (1944). Nevertheless, the language used in § 32 (5) is in my view sufficiently broad to permit suit in both state and federal courts.

eral statutes to play in avoiding the danger of fraud and other evils in the raising of the massive sums the project involved. See *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, 195 (1963); H. R. Rep. No. 85, 73d Cong., 1st Sess., 2–3 (1933). No doubt New York's intensive regulation also helps avoid those evils. See N. Y. Priv. Hous. Fin. Law. But Congress contemplated concurrent state and federal regulation in enacting the securities laws. *SEC* v. *Variable Annuity Co.*, 359 U. S., at 75 (concurring opinion), and therefore the existence of state regulation does not and cannot be a reason for excluding appropriate application of the federal statutes. Indeed, the resident-stockholder investors of Co-op City are particularly entitled to the federal protection. The District Court properly observed:

> "[I]f ever there was a group of people who need and deserve full and careful disclosure in connection with proposals for the use of their funds, it is this type of group. . . . The housing selection decision is a critical one in their lives. The cost of housing demands a good percentage of their incomes. Their savings are most likely to be minimal, and they probably don't have lawyers or accountants to guide them. Further, they are people likely to put a great deal of credence in statements made with respect to an offering by reputable civic groups and labor unions, particularly when the proposal is stamped with the imprimatur of the state." 366 F. Supp., at 1125.

I part from the District Court in concluding however that investors not only *should be* protected but, under my reading of the statutes, *are* protected by the securities laws. A different, perhaps better, form of redress can and will be devised for this kind of investment, but until it is these investors are not to be denied what the

federal statutes plainly allow them. See Note, Cooperative Housing Corporations and the Federal Securities Laws, 71 Col. L. Rev. 118 (1971). The SEC, though perhaps tardily, has come to the view that these housing corporations fall within its regulatory authority because the kind of investment involved is a "security" under the statutes. I wholly agree. I would affirm the judgment of the Court of Appeals.

Reporter's Note

The next page is purposely numbered 901. The numbers between 869 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 7 THROUGH JUNE 9, 1975

APRIL 7, 1975

Dismissal Under Rule 60

No. 74–730. ROEMER ET AL. *v.* BOARD OF PUBLIC WORKS OF MARYLAND ET AL. Appeal from D. C. Md. [Probable jurisdiction noted, 420 U. S. 922.] Appeal dismissed under this Court's Rule 60.

APRIL 14, 1975*

Appeals Dismissed

No. 74–5850. WICKS *v.* CITY OF CHARLOTTESVILLE. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 215 Va. 274, 208 S. E. 2d 752.

No. 74–6030. RIVERS *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–6043. HARRIS *v.* CITY OF HOUSTON, TEXAS, ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 502 F. 2d 1165.

Vacated and Remanded on Appeal

No. 74–497. BT INVESTMENT MANAGERS, INC., ET AL. *v.* DICKINSON, COMPTROLLER OF FLORIDA. Appeal from

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

D. C. N. D. Fla. Judgment vacated and case remanded so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Fifth Circuit. Reported below: 379 F. Supp. 792.

Certiorari Granted—Vacated and Remanded

No. 73–2013. FAIR, SHERIFF *v.* SMITH ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bellis* v. *United States*, 417 U. S. 85 (1974). Reported below: 495 F. 2d 1373.

Miscellaneous Orders

No. ———. ROSSI, EXECUTOR *v.* SPECTOR ET AL. C. A. 2d Cir. Motion to dispense with printing petition for writ of certiorari and other relief denied. *Snider* v. *All State Administrators, Inc.*, 414 U. S. 685 (1974).

No. A–1310, October Term, 1973. AUDUBON SOCIETY, LOS ANGELES CHAPTER, ET AL. *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Motion of the County of Los Angeles to vacate stay heretofore entered by MR. JUSTICE DOUGLAS on August 15, 1974, granted.

No. A–640 (74–942). RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* GOODE ET AL. [Certiorari granted, 420 U. S. 1003.] Application to recall and stay mandate of the United States Court of Appeals for the Third Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending final disposition of the case in this Court.

No. A–789. NATIONAL RIGHT TO WORK LEGAL DEFENSE & EDUCATION FOUNDATION, INC. *v.* RICHEY, U. S. DISTRICT JUDGE. Application for stay of disclosure order of the United States District Court for the District of Columbia issued June 5, 1974, presented to THE CHIEF

JUSTICE, and by him referred to the Court, denied. Reported below: 376 F. Supp. 1060.

No. A–818. COLON, GOVERNOR OF PUERTO RICO, ET AL. *v.* ORTIZ ET AL. Application for stay of judgment of United States District Court for the District of Puerto Rico, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pending timely docketing of appeal and final disposition thereon in this Court. Reported below: 385 F. Supp. 111.

No. D–24. IN RE DISBARMENT OF NITSBERG. It having been reported to this Court that Michael B. Nitsberg, of New York, N. Y., has been suspended indefinitely from the practice of law in all of the courts of the State of New York, and this Court by order of November 18, 1974 [419 U. S. 1016], having suspended the said Michael B. Nitsberg, from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and that a response has been filed;

It is ordered that the said Michael B. Nitsberg be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–25. IN RE DISBARMENT OF LEACH. It having been reported to this Court that Arthur Dale Leach, of Silver Spring, Md., has been disbarred from the practice of law in the United States Court of Appeals for the District of Columbia Circuit and the Court of Appeals of Maryland has accepted his resignation, with prejudice, and this Court by order of January 13, 1975 [419 U. S. 1101], having suspended the said Arthur Dale Leach from the practice of law in this Court and directed

that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said Arthur Dale Leach be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–31. IN RE DISBARMENT OF ROSS. It having been reported to this Court that John A. Ross, Jr., of New York, N. Y., has been disbarred from the practice of law in all of the courts of the State of New York, and this Court by order of January 13, 1975 [419 U. S. 1102], having suspended the said John A. Ross, Jr., from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said John A. Ross, Jr., be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–40. IN RE DISBARMENT OF GILBERT. It having been reported to this Court that Donald E. Gilbert, of East Northport, N. Y., has been suspended from the practice of law in all of the courts of the State of New York, and this Court by order of February 24, 1975 [420 U. S. 941], having suspended the said Donald E. Gilbert from the practice of law in this Court and directed that

a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response has been filed;

It is ordered that the said Donald E. Gilbert be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–48. IN RE DISBARMENT OF EHRLICHMAN. It is ordered that John Daniel Ehrlichman, of Bellevue, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this matter.*

No. 36, Orig. TEXAS *v.* LOUISIANA. Report of Special Master received and ordered filed. Exceptions, if any, with supporting briefs to Report may be filed by the parties on or before May 29, 1975. Reply briefs, if any, to such exceptions may be filed on or before June 30, 1975. [For previous orders herein, see, *e. g.*, 416 U. S. 965.]

No. 73–1513. UNITED STATES *v.* JENKINS, 420 U. S. 358. C. A. 2d Cir. Motion of respondent for appointment of counsel *nunc pro tunc* granted. It is ordered that James S. Carroll, Esquire, of New York, N. Y., be, and he is hereby, appointed to serve as counsel for respondent in this case.

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*See also note, *supra*, p. 901.

No. 73–776. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* BALLARD, 419 U. S., 498. Motion of appellee to retax costs denied. MR. JUSTICE BRENNAN would grant the motion.

No. 74–80. KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* HELFANT; and

No. 74–277. HELFANT *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. C. A. 3d Cir. [Certiorari granted, 419 U. S. 1019.] Motion to strike oral argument denied.

No. 74–116. PLACE *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., 419 U. S. 1040. The Solicitor General is requested to file a response to petition for rehearing within 30 days.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. [Certiorari granted, 419 U. S. 895.] These cases restored to calendar for reargument.

No. 74–456. HILL, ATTORNEY GENERAL OF TEXAS, ET AL. *v.* PRINTING INDUSTRIES OF THE GULF COAST ET AL. Appeal from D. C. S. D. Tex. [Probable jurisdiction noted, 419 U. S. 1088.] Motion of Common Cause for leave to participate in oral argument as *amicus curiae* denied.

No. 74–928. UNITED STATES *v.* DINITZ. C. A. 5th Cir. [Certiorari granted, 420 U. S. 1003.] Motion for appointment of counsel granted. It is ordered that Fletcher H. Baldwin, Jr., Esquire, of Gainesville, Fla., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 74–450. BUTTERFIELD, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. *v.* ROBERTSON ET AL. C. A. D. C. Cir. [Certiorari granted, 419 U. S. 1067.] Motion of Mary Helen Sears for leave to participate in oral argument as *amicus curiae* denied.

No. 74–121. PHELPS, RECEIVER IN BANKRUPTCY *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 419 U. S. 1068.] Motion to postpone oral argument denied.

No. 74–676. ESTELLE, CORRECTIONS DIRECTOR *v.* WILLIAMS. C. A. 5th Cir. [Certiorari granted, 420 U. S. 907.] Motion for appointment of counsel granted. It is ordered that Ben L. Aderholt, Esquire, of Houston, Tex., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 74–878. NATIONAL LEAGUE OF CITIES ET AL. *v.* DUNLOP, SECRETARY OF LABOR; and

No. 74–879. CALIFORNIA *v.* DUNLOP, SECRETARY OF LABOR. Appeals from D. C. D. C. [Probable jurisdiction noted, 420 U. S. 906.] Motion of Harrison A. Williams, Jr., et al. for leave to file a brief as *amici curiae* granted.

No. 74–882. DE CANAS ET AL. *v.* BICA ET AL. Ct. App. Cal., 2d App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–5116. MURPHY *v.* FLORIDA. C. A. 5th Cir. [Certiorari granted, 419 U. S. 1088.] Motion of respondent to permit William L. Rogers, Esquire, to argue *pro hac vice* granted.

No. 74–1164. ALFRED A. KNOPF, INC., ET AL. *v.* COLBY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. 4th Cir. Motion to expedite consideration of petition for writ of certiorari denied.

No. 74–5566. BARRETT *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 420 U. S. 923.] Motion for appointment of counsel granted. It is ordered that Thomas A. Schaffer, Esquire, of Cincinnati, Ohio, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 74–6216. MCCORMICK *v.* LILLY, JUDGE. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–6042. SIMS *v.* MORTON, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 74–775. CITY OF NEW ORLEANS ET AL. *v.* DUKES, DBA LOUISIANA CONCESSIONS. Appeal from C. A. 5th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 501 F. 2d 706.

No. 74–858. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* SUGAR ET AL.; and

No. 74–859. CURTIS CIRCULATION CO. ET AL. *v.* SUGAR ET AL. Appeals from D. C. S. D. N. Y. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 383 F. Supp. 643.

Certiorari Granted

No. 74–848. DAVID, COMMANDER, FORT DIX MILITARY RESERVATION, ET AL. *v.* SPOCK ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 502 F. 2d 953.

No. 74–891. PAUL, CHIEF OF POLICE, LOUISVILLE, ET AL. *v.* DAVIS. C. A. 6th Cir. Certiorari granted. Reported below: 505 F. 2d 1180.

No. 74–944. TIME, INC. *v.* FIRESTONE. Sup. Ct. Fla. Certiorari granted. Reported below: 305 So. 2d 172.

No. 74–1042. ERNST & ERNST *v.* HOCHFELDER ET AL. C. A. 7th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 503 F. 2d 1100.

Certiorari Denied. (See also Nos. 74–6030 and 74–6043, *supra.*)

No. 73–175. FEIN ET AL. *v.* UNITED STATES; and
No. 73–5115. KESSLER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–231. GRAY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 477 F. 2d 974.

No. 73–622. MARGOLIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 483 F. 2d 1399.

No. 73–1412. GROSSO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 492 F. 2d 1239.

No. 73–1503. SCAGLIONE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 799.

No. 73–1510. PACHECO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 554.

No. 73–1951. REVEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 1.

No. 73–1795. MASCAVAGE ET AL. *v.* SCHLESINGER, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 161 U. S. App. D. C. 237, 494 F. 2d 1156.

No. 73–2010. PETRAGLIA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–6030. SEDIVY *v.* SCHLESINGER, SECRETARY OF DEFENSE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 485 F. 2d 1115.

No. 74–713. ALVAREZ *v.* UNITED STATES;
No. 74–5684. INFIESTA *v.* UNITED STATES;
No. 74–5685. DEL CRISTO *v.* UNITED STATES;
No. 74–5736. BUSIGO-CIFRE *v.* UNITED STATES;
No. 74–5804. CALANA *v.* UNITED STATES; and
No. 74–5827. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 455.

No. 74–746. DIRECTOR OF CIVIL SERVICE OF MASSACHUSETTS ET AL. *v.* BOSTON CHAPTER, N.A.A.C.P., INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 504 F. 2d 1017.

No. 74–764. BARRY ET AL. *v.* UNITED STATES;
No. 74–781. GERAGHTY ET AL. *v.* UNITED STATES;
No. 74–782. BRAASCH *v.* UNITED STATES; and
No. 74–5752. ARMSTRONG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 505 F. 2d 139.

No. 74–778. MCHENRY ET AL. *v.* CITY OF MOBILE. Ct. Crim. App. Ala. Certiorari denied. Reported below: 53 Ala. App. 739, 299 So. 2d 779.

No. 74–824. PERSKY *v.* UNITED STATES; and
No. 74–913. ZANE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 346.

No. 74–820. FINK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1.

No. 74–828. CELCER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 734.

No. 74–837. WILLIAMS, AKA ERVIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1399.

No. 74–902. INGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 1287.

No. 74–845. CHIM MING ET AL. *v.* MARKS, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 1170.

No. 74–861. HARWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1400.

No. 74–864. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–865. KOSS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1103.

No. 74–886. BADALAMENTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 12.

No. 74–889. BELL *v.* TAYLOR'S WELDING SERVICE, INC., ET AL.; and

No. 74–1002. TAYLOR'S WELDING SERVICE, INC., ET AL. *v.* BELL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 298 So. 2d 327.

No. 74–838. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–910. BAKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 692.

No. 74–915. VITELLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 508 F. 2d 834.

No. 74–926. CITY OF PITTSBURGH *v.* PUBLIC PARKING AUTHORITY OF PITTSBURGH ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 11 Pa. Commw. 442, 314 A. 2d 887.

No. 74–931. TERRY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 543, 499 F. 2d 695.

No. 74–933. SECOND NATIONAL BANK OF NORTH MIAMI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 535.

No. 74–947. KNIGHT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 208.

No. 74–957. CALDWELL, ADMINISTRATRIX, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 202 Ct. Cl. 423, 481 F. 2d 898.

No. 74–930. ILLINOIS ET AL. *v.* FEDERAL POWER COMMISSION ET AL. C. A. 8th Cir. Certiorari denied.

No. 74–960. GEORGE MITCHELL & ASSOCIATES, INC. *v.* MACDONALD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 248, 505 F. 2d 355.

No. 74–975. RICHARDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–974. ROBERTSON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 289.

No. 74–978. TIME-D. C., INC. *v.* GARRETT, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 627.

No. 74–981. RAMSEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 283, 506 F. 2d 1322.

No. 74–990. MUNGER ET AL. *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 74–997. FENDER *v.* ST. LOUIS SOUTHWESTERN RAILWAY CO. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 513 S. W. 2d 131.

No. 74–1000. SANTIAGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 74–1005. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* BOEING CO. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 307.

No. 74–1012. HUNTSVILLE BOARD OF EDUCATION ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 857.

No. 74–1017. CUMMINGS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 449.

No. 74–1018. HICKMAN ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 59 Ill. 2d 89, 319 N. E. 2d 511.

No. 74–1007. SHEERAN ET AL. *v.* GENERAL ELECTRIC CO. C. A. 9th Cir. Certiorari denied.

No. 74–1022. LUCERO, A MINOR, BY LUCERO *v.* ROOSEVELT IRRIGATION DISTRICT. Ct. App. Ariz. Certiorari denied.

No. 74–1026. GIBSON *v.* KROGER CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 647.

No. 74–1031. FILES V. HEISKELL, SECRETARY OF STATE OF WEST VIRGINIA, ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 74–1036. PEYMANN *v.* PERINI CORP. C. A. 1st Cir. Certiorari denied. Reported below: 507 F. 2d 1318.

No. 74–1038. LAYNE-NEW YORK CO., INC. *v.* ALLIED ASPHALT CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 501 F. 2d 405.

No. 74–1041. SILVERLITH, INC. *v.* AZOPLATE CORP. C. A. 3d Cir. Certiorari denied. Reported below: See 367 F. Supp. 711.

No. 74–1043. NISSAN MOTOR CORPORATION IN U. S. A. *v.* SANDERSON. C. A. 10th Cir. Certiorari denied. Reported below: 507 F. 2d 477.

No. 74–1048. RANDY'S HOUSE OF STEELE, INC. *v.* CEPON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1404.

No. 74–1058. BRUNI *v.* DEPARTMENT OF REGISTRATION AND EDUCATION OF ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 59 Ill. 2d 6, 319 N. E. 2d 37.

No. 74–1074. WILLEY ET AL. *v.* GARNSEY ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 45 App. Div. 2d 227, 357 N. Y. S. 2d 281.

No. 74–1053. CHERMACK *v.* BJORNSON, STATE TREASURER, ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 302 Minn. 213, 223 N. W. 2d 659.

No. 74–1067. SCHUBERT *v.* NATIONAL COLLEGIATE ATHLETIC ASSN., AKA NCAA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1402.

No. 74–1088. MONTEZ *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 74–1089. MARKOWITZ ET AL. *v.* LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 74–1171. GABRIEL ET AL. *v.* LEVIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–5560. HENRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 483 F. 2d 1401.

No. 74–5660. FULFORD *v.* HUNT, DIRECTOR OF INSTITUTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–5663. FULFORD *v.* HUNT, DIRECTOR OF INSTITUTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–5694. BURKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 506 F. 2d 1165.

No. 74–5765. CHAPMAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–5834. MCFALL *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1052.

No. 74–5842. WILLIAMS *v.* DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, ET AL. Super. Ct. N. J. Certiorari denied.

No. 74–5859. PARKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 587.

No. 74–5860. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 759.

No. 74–5863. DOLAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5870. MCMILLAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 101.

No. 74–5873. FLOOD *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 301 So. 2d 637.

No. 74–5875. KOEHLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 758.

No. 74–5877. CYPRYLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5881. GRANZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1302.

No. 74–5892. SAWYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 878.

No. 74–5894. BALDWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 759.

No. 74–5895. ISSOD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 508 F. 2d 990.

No. 74–5901. MACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 615.

No. 74–5884. HAMPTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 504 F. 2d 600.

No. 74–5902. DYCHES *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 507 F. 2d 106.

No. 74–5903. KENNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 409.

No. 74–5917. JOHNSON ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 674.

No. 74–5921. WARREN, AKA MCCRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1303.

No. 74–5928. HENDERSHOT ET AL. *v.* UNITED STATES;
No. 74–5929. HUDSON *v.* UNITED STATES; and
No. 74–5930. GASAWAY ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1403.

No. 74–5931. GALLOWAY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5937. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–5945. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1051.

No. 74–5946. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1055.

No. 74–5932. CEDILLO-LOPEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5965. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 620.

No. 74–5970. HILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–5975. PIZZA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 839.

No. 74–5978. HAWK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–6012. WEBSTER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 926.

No. 74–6018. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1055.

No. 74–6028. ALVAREZ ET AL., T/A GREENWOOD SHELL AUTO CENTER *v.* HACKENSACK TRUST CO. Sup. Ct. N. J. Certiorari denied. Reported below: 66 N. J. 275, 330 A. 2d 359.

No. 74–6034. WHITE *v.* MICHIGAN STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied.

No. 74–6040. FRANCO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–6045. PAYNE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–6046. WASHINGTON ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 302 So. 2d 401.

No. 74–6053. CULPEPER *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 74–6058. LIPSCOMB *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 74–6059. CLARK *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 74–6060. MACK *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6063. FAUGHT *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 507 F. 2d 273.

No. 74–6064. ESSER *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 74–6071. ROSENBORGH ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 21 Ill. App. 3d 676, 315 N. E. 2d 545.

No. 74–6076. PERKINS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–6078. DARNOLD *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–6080. WALKER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 21 Ill. App. 3d 202, 315 N. E. 2d 244.

No. 74–6084. IN RE JII. C. A. 6th Cir. Certiorari denied. Reported below: 497 F. 2d 924.

No. 74–6085. BOOTON *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 114 N. H. 750, 329 A. 2d 376.

No. 74–6090. BAEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6091. ARMOUR *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 74–6098. HOOBAN *v.* BOLING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 503 F. 2d 648.

No. 74–6099. HUGHES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1278.

No. 74–6100. BLANTON *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied.

No. 74–6103. LENTZ *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–6105. FREEDMAN *v.* SLAVIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74–6110. THOMAS *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–6143. HOPKINS ET AL. *v.* ANDERSON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 507 F. 2d 530.

No. 74–6159. SMALLWOOD *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 73–406. BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. *v.* DOE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 479 F. 2d 646.

No. 74–802. ILLINOIS *v.* BAUGH. App. Ct. Ill., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 19 Ill. App. 3d 448, 311 N. E. 2d 607.

No. 74–6175. KAPLAN *v.* CONTINENTAL CAN CO., INC. Super. Ct. N. J. Certiorari denied.

No. 74–943. PREISER, CORRECTIONAL COMMISSIONER, ET AL. *v.* SERO ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 506 F. 2d 1115.

No. 74–1068. BENSINGER, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 507 F. 2d 390.

No. 73–1643. DARDEN *v.* WITHAM ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.*

No. 74–1040. WHITE MOTOR CORP. ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 505 F. 2d 1193.

No. 74–1073. FIRST NATIONAL BANK OF OREGON *v.* AMERICAN TIMBER & TRADING CO. ET AL. C. A. 9th Cir. Motion of American Bankers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 511 F. 2d 980.

Rehearing Denied

No. 73–1285. WOOD ET AL. *v.* STRICKLAND, 420 U. S. 308; and

No. 74–479. ESTELLE, CORRECTIONS DIRECTOR *v.* DORROUGH, 420 U. S. 534. Petitions for rehearing denied.

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*See also note, *supra*, p. 901.

No. 74–592. SUTHERLAND *v.* IMMIGRATION AND NATURALIZATION SERVICE, 420 U. S. 946;

No. 74–701. ECONOMY FINANCE CORP. ET AL. *v.* UNITED STATES, 420 U. S. 947;

No. 74–788. ADDRISI *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, 420 U. S. 929; and

No. 74–812. CHAMPION OIL SERVICE CO. *v.* SINCLAIR OIL CORP. ET AL., 420 U. S. 930. Petitions for rehearing denied.

No. 74–787. WILLIS *v.* UNITED STATES, 420 U. S. 963. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

APRIL 21, 1975*

Affirmed on Appeal

No. 74–1078. GONZALES *v.* COUGHENOUR. Affirmed on appeal from D. C. N. M.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–587, *Bowen* v. *United States, infra,* p. 929; No. 74–588, *School Town of Speedway* v. *United States, infra,* p. 929; No. 74–605, *Board of School Comm'rs* v. *United States, infra,* p. 929; No. 74–806, *Keen* v. *United States, infra,* p. 929; No. 74–857, *Bucolo* v. *Florida, infra,* p. 927; No. 74–873, *Phillips* v. *Graf Electric, Inc., infra,* p. 929; No. 74–876, *Draganescu* v. *First National Bank of Hollywood, infra,* p. 929; No. 74–877, *Harden* v. *Parks, infra,* p. 926; No. 74–963, *First National Bank of Fayetteville* v. *Smith, infra,* p. 930; No. 74–965, *Warner Co.* v. *United States, infra,* p. 930; No. 74–976, *Dunham* v. *United States, infra,* p. 930; No. 74–982, *Hearst Corp.* v. *Los Angeles Newspaper Guild, infra,* p. 930; No. 74–988, *McCord* v. *United States, infra,* p. 930; No. 74–992, *Seaver* v. *Wiegand, infra,* p. 924; No. 74–1070, *Rey* v. *Texas, infra,* p. 926; No. 74–1078, *Gonzales* v. *Coughenour, infra,* this page; No. 74–1086, *Los Angeles Newspaper Guild* v. *Hearst Corp., infra,* p. 930.

Appeals Dismissed

No. 73–1973. ART THEATER GUILD, INC., ET AL. *v.* EWING. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 37 Ohio St. 2d 95, 307 N. E. 2d 911.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellee brought this action in the Court of Common Pleas of Lucas County, Ohio, to prohibit showing of the motion picture "Without A Stitch" on the theory that the film's exhibition rendered the theater itself a nuisance. Under Ohio law, any place which exhibits filmed obscenity is a nuisance. See *State ex rel. Keating* v. *A Motion Picture Film Entitled "Vixen,"* 35 Ohio St. 2d 215, 301 N. E. 2d 880 (1973). Obscenity was defined as follows:

> "(A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> "(1) Its dominant appeal is to prurient interest;
>
> "(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> "(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> "(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake

or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." Ohio Rev. Code Ann. § 2905.34 (Supp. 1972), now Ohio Rev. Code Ann. § 2907.01 (1975).

The Court of Common Pleas found the film obscene and enjoined its exhibition. The Lucas County Court of Appeals and the Ohio Supreme Court affirmed. *State ex rel. Ewing* v. *A Motion Picture Film Entitled "Without a Stitch,"* 37 Ohio St. 2d 95, 307 N. E. 2d 911 (1974).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since it is clear that, when tested by that constitutional standard, § 2905.34 is unconstitutionally overbroad and therefore facially invalid, I disagree with the holding that the appeal does not present a substantial federal question, and therefore dissent from the Court's dismissal of the appeal.

For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), and because the judgment of the Ohio Supreme Court was rendered after *Miller,* I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 74–992. SEAVER, JUDGE, ET AL. *v.* WIEGAND. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken

as a petition for writ of certiorari, certiorari denied. Reported below: 504 F. 2d 303.

No. 74–985. S. S. & W., INC., ET AL. *v.* KANSAS CITY ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 515 S. W. 2d 487.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellants, operators of adult theaters and book stores, commenced this action in the Circuit Court of Missouri, Sixteenth Judicial District, for a declaratory judgment that Kansas City's obscenity ordinance, §§ 26.141 to 26.144, is unconstitutional. Section 26.142 provides in pertinent part as follows:

"No person shall knowingly:

"(a) Sell, deliver or provide, or offer or agree to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene; or

. . . . .

"(c) Publish, exhibit or otherwise make available any obscene material; or

"(d) Possess any obscene material for the purpose of sale or other commercial dissemination . . . ."

"Obscene" is defined in § 26.141, which provides:

"Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes beyond customary limits of candor in describing or representing such matters."

The Circuit Court found the ordinance valid and denied relief. The Supreme Court of Missouri affirmed. 515 S. W. 2d 487.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 26.142, as it incorporates the definition of "obscene" in § 26.141, is unconstitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California,* 413 U. S. 15, 47 (1973), I would therefore note probable jurisdiction, and, since the judgment of the Supreme Court of Missouri was rendered after *Miller,* reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York,* 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 74–1070. REY *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 8th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 512 S. W. 2d 40.

Vacated and Remanded on Appeal

No. 74–5898. COHEN *v.* MARSH ET AL. Appeal from D. C. Conn. Motion of appellant for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for consideration of question of mootness.

Certiorari Granted—Vacated and Remanded

No. 74–877. HARDEN, COMMISSIONER OF HUMAN RESOURCES OF GEORGIA *v.* PARKS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for

further consideration in light of *Burns* v. *Alcala*, 420 U. S. 575 (1975). Reported below: 504 F. 2d 861.

Certiorari Granted—Reversed

No. 74–857. BUCOLO ET AL. *v.* FLORIDA. Sup. Ct. Fla. Certiorari granted and judgment reversed. *Jenkins* v. *Georgia*, 418 U. S. 153 (1974), and *Kois* v. *Wisconsin*, 408 U. S. 229 (1972). Reported below: 303 So. 2d 329.

Miscellaneous Orders

No. A–681 (74–6345). LEE *v.* UNITED STATES. Reapplication for stay of mandate of the United States Court of Appeals for the Second Circuit, entered February 3, 1975, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. MR. JUSTICE STEWART would grant the stay. Reported below: 509 F. 2d 645.

No. A–767. BOWLING *v.* SCOTT ET AL. C. A. 5th Cir. Reapplication for stay or other relief, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 511 F. 2d 112.

No. D–47. IN RE DISBARMENT OF MAYES. It is ordered that Ronald W. Mayes of Washington, D. C., and Madison, Kan., be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion for leave to file bill of complaint granted and defendant allotted 60 days to answer.

No. 74–337. DORAN *v.* SALEM INN, INC., ET AL. Appeal from C. A. 2d Cir. [Probable jurisdiction noted, 419 U. S. 1119.] Motion of town of Smithtown for leave to file untimely brief as *amicus curiae* denied.

No. 74–364. UNITED STATES *v.* HALE. C. A. D. C. Cir. [Certiorari granted, 419 U. S. 1045.] Motion of respondent for appointment of counsel *nunc pro tunc* granted. It is ordered that Larry J. Ritchie, Esquire, of Washington, D. C., be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 74–653. MICHIGAN *v.* MOSLEY. Ct. App. Mich. [Certiorari granted, 419 U. S. 1119.] Motion of Americans for Effective Law Enforcement, Inc., for leave to file a brief as *amicus curiae* granted.

No. 74–1027. GARCIA ET AL. *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS ET AL. Appeal from D. C. W. D. Tex. Motion to defer consideration of appeal granted.

No. 74–1204. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to expedite and to consolidate this case with No. 74–653, *Michigan* v. *Mosley, supra,* denied.

No. 74–6232. HARRELSON *v.* UNITED STATES ET AL. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Granted

No. 74–1025. HINES ET AL. *v.* ANCHOR MOTOR FREIGHT, INC., ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition which reads as follows: "Whether petitioners' claim under LMRA § 301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of overwhelming evidence of their innocence of the alleged

dishonesty for which they were discharged?" Reported below: 506 F. 2d 1153.

No. 74–5968. GEDERS *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition which reads as follows: "Did the Court's order prohibiting defendant Geders and his attorney from conferring with each other during a sixteen-hour period at a crucial stage of the trial deprive defendant Geders of his Sixth Amendment right to assistance of counsel?" Reported below: 502 F. 2d 1.

Certiorari Denied. (See also Nos. 74–992 and 74–1070, *supra.*)

No. 74–255. MURPHY *v.* MURPHY. Sup. Ct. Ga. Certiorari denied. Reported below: 232 Ga. 352, 206 S. E. 2d 458.

No. 74–587. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* UNITED STATES ET AL.;

No. 74–588. SCHOOL TOWN OF SPEEDWAY, INDIANA, ET AL. *v.* UNITED STATES ET AL.; and

No. 74–605. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 68.

No. 74–806. KEEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 508 F. 2d 986.

No. 74–873. PHILLIPS ET AL. *v.* GRAF ELECTRIC, INC. Sup. Ct. Kan. Certiorari denied.

No. 74–876. DRAGANESCU ET AL. *v.* FIRST NATIONAL BANK OF HOLLYWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 502 F. 2d 550.

No. 74–963. First National Bank of Fayetteville et al. *v.* Smith, Comptroller of the Currency, et al. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1371.

No. 74–965. Warner Co. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 504 F. 2d 689.

No. 74–976. Dunham et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 80.

No. 74–982. Hearst Corp. et al. *v.* Los Angeles Newspaper Guild, Local 69, American Newspaper Guild, AFL–CIO, CLC; and

No. 74–1086. Los Angeles Newspaper Guild, Local 69, American Newspaper Guild, AFL–CIO, CLC *v.* Hearst Corp. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 636.

No. 74–988. McCord, aka Warren, et al. *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 166 U. S. App. D. C. 1, 509 F. 2d 334.

No. 74–1004. Rogers *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 257 Ark. 144, 515 S. W. 2d 79.

No. 74–1009. Clear Gravel Enterprises, Inc. *v.* Keil, Director, Bureau of Land Management of Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 2d 180.

No. 74–1092. Brown *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 74–1016. Kahn *v.* Dynamics Corporation of America. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 939.

No. 74–1010. SLATTON *v.* MARTIN K. EBY CONSTRUCTION CO., INC., DBA EBY & ASSOCIATES OF ARKANSAS. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 505.

No. 74–1079. MARITIME OVERSEAS CORP. ET AL. *v.* LINABARY. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 727.

No. 74–1087. ROSS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 257 Ark. 44, 514 S. W. 2d 409.

No. 74–1099. VILLAGE OF CAMILLUS ET AL. *v.* DIAMOND, COMMISSIONER OF ENVIRONMENTAL CONSERVATION. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 74–1122. BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* NEWBURG AREA COUNCIL, INC., ET AL.; and

No. 74–1123. BOARD OF EDUCATION OF LOUISVILLE, KENTUCKY, ET AL. *v.* HAYCRAFT ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–1136. DERBY *v.* CONNECTICUT LIGHT & POWER CO. Sup. Ct. Conn. Certiorari denied. Reported below: 167 Conn. 136, 355 A. 2d 244.

No. 74–5825. HOLLINS *v.* UNITED STATES; and

No. 74–5957. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–5841. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 845.

No. 74–5876. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1398.

No. 74–5878. LEWIS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–5896. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1303.

No. 74–5900. GREENE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 302 So. 2d 202.

No. 74–5935. HENRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 504 F. 2d 1335.

No. 74–5939. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 839.

No. 74–5949. DIXON *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–5950. TALK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–5960. NEEDHAM *v.* UNITED STATES; and
No. 74–6021. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5982. WATSON *v.* UNITED STATES. C. A. 3rd Cir. Certiorari denied. Reported below: 510 F. 2d 971.

No. 74–6006. ROBERTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–6007. MIKE *v.* LEVI, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied.

No. 74–6038. SHEPHERD *v.* SHEPHERD. Sup. Ct. Ga. Certiorari denied. Reported below: 233 Ga. 228, 210, S. E. 2d 731.

No. 74–6088. MATTHEWS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 74–6109. BRAGG *v.* MID-AMERICA FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–6112. NORTON *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6114. MOSS *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 505 F. 2d 811.

No. 74–6115. KUHL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 74–6116. GUNDLACH *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 192 Neb. 692, 224 N. W. 2d 167.

No. 74–6119. HORTON *v.* MAGISTRATE OF THE COURT ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–6120. WEINER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 74–6124. WOOD *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6135. DRAYTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1401.

No. 74–6138. RUTHERFORD *v.* CUPP, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. Reported below: 508 F. 2d 122.

No. 74–6145. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–982. ADULT BOOK STORE ET AL. *v.* SENSENBRENNER, MAYOR OF COLUMBUS. Sup. Ct. Ohio. Certiorari denied. Reported below: 35 Ohio St. 2d 220, 301 N. E. 2d 695.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were enjoined from selling or distributing 127 publications determined to be obscene under the Ohio obscenity statute, Ohio Rev. Code Ann. §§ 2905.34–2905.35 (Supp. 1972). The Court of Appeals of Franklin County affirmed, and the Supreme Court of Ohio dismissed the appeal. We granted the petition for certiorari and remanded the case for further consideration in light of *Miller* v. *California*, 413 U. S. 15 (1973). 413 U. S. 911 (1973). On remand, the Supreme Court of Ohio affirmed the judgment of the Court of Appeals. 35 Ohio St. 2d 220, 301 N. E. 2d 695.

For the reasons stated in my dissent from the remand of this case, and because the present judgment was rendered after *Miller*, I would grant the petition and reverse the judgment.

No. 74–783. DEMARRIAS *v.* POITRA. C. A. 8th Cir. Motion of Standing Rock Sioux Tribe for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 502 F. 2d 23.

MR. JUSTICE WHITE, dissenting.

Petitioner and respondent are both enrolled Indians residing on the Standing Rock Sioux Indian Reservation, a reservation which straddles the border of North Dakota and South Dakota. Petitioner is resident in the portion of the reservation in South Dakota, and respondent lives within that portion in North Dakota. This litigation arose from an automobile accident occurring on the reservation in North Dakota. Respondent's son was injured by a car

driven by petitioner and died as a result. Respondent brought this wrongful death action based upon North Dakota law in the Federal District Court, invoking its jurisdiction under 28 U. S. C. § 1332 (a). When petitioner failed to respond, the North Dakota Unsatisfied Judgment Fund appeared and moved to dismiss for lack of subject-matter jurisdiction.

The District Court, basing its decision upon *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), concluded that it did not have jurisdiction over respondent's suit. The Standing Rock Sioux Tribe had not consented to the jurisdiction of the North Dakota state courts, as required for the exercise of state-court jurisdiction in civil suits between Indians under 25 U. S. C. § 1322 (a), and the state courts would not have jurisdiction over respondent's suit although based upon North Dakota substantive law. See *Gourneau* v. *Smith*, 207 N. W. 2d 256 (ND 1973). Viewing itself as another state court in diversity cases, the District Court concluded that it, too, could not entertain the suit. 369 F. Supp. 257 (ND 1973).

The Court of Appeals reversed. 502 F. 2d 23 (CA8 1974). It concluded that there was no state policy involved in the absence of state-court jurisdiction over this type of litigation. The lack of jurisdiction arose from the *federal* requirement of consent by the Indians to such jurisdiction and the failure of the tribe here to consent. The federal "consent" statute, 25 U. S. C. § 1322 (a), was not intended to deprive Indians of state-created substantive rights, but rather had as its purpose an effort to prevent the States from interfering with Indian affairs. See 502 F. 2d, at 29.

The court below acknowledged that the Court of Appeals for the Ninth Circuit had in two decisions held that a district court could not exercise diversity jurisdiction in situations in which the state courts would not exercise

subject-matter jurisdiction. See *Hot Oil Service, Inc.* v. *Hall*, 366 F. 2d 295 (1966); *Littell* v. *Nakai*, 344 F. 2d 486 (1965), cert. denied, 382 U. S. 986 (1966). It distinguished those decisions on the ground that each involved an effort to avoid interference, under the principle of *Williams* v. *Lee*, 358 U. S. 217 (1959), with tribal self-government. In this case, in contrast, the suit involved a dispute between two Indian litigants, and there were no "interfering outsiders . . . trying to foist jurisdiction on the Indians." 502 F. 2d, at 29.

The court below, however, misconstrued the role of the discussion of *Williams* v. *Lee*, *supra*, in the Ninth Circuit decisions. When those cases were decided, the question of whether the subject matter of the litigation was essential to tribal self-government was the key to whether state courts could exercise jurisdiction. See 358 U. S., at 223. Since its enactment in 1968, however, the "consent" statute, 25 U. S. C. §§ 1322 (a) and 1326, provides an explicit procedure through which civil jurisdiction over Indians can be obtained by state courts. See *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 177–178 (1973); *Kennerly* v. *District Court of Montana*, 400 U. S. 423 (1971). It is conceded here that the subject matter of this suit, whether or not essential to tribal self-government, cannot be the basis for state-court jurisdiction. Therefore, the significant aspect of the Ninth Circuit decisions is their reliance upon *Woods* v. *Interstate Realty Co.*, 337 U. S. 535 (1949). Extending that reliance to this case would result in a conclusion that the federal courts did not have jurisdiction.

The decisions of the Courts of Appeals for the Eighth and Ninth Circuits are, therefore, squarely in conflict, and resolution of the conflict will require an appraisal of the roles of the *Erie R. Co.* v. *Tompkins* line of cases

and of the federal legislation governing jurisdiction by state courts over Indians in this factual situation.

I would grant certiorari.

No. 74–1037. ALLIGATOR CO., INC. *v.* LA CHEMISE LACOSTE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 339.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL join, dissenting.

Respondent La Chemise Lacoste (LCL) initiated this trademark litigation by filing a complaint seeking declaratory and injunctive relief in the Delaware state courts. Petitioner removed it to the District Court under 28 U. S. C. § 1441 (a). The District Court denied respondent's motion for a remand under 28 U. S. C. § 1447 (c). See 313 F. Supp. 915 (Del. 1970). The District Court also denied respondent's motion for a certificate allowing an interlocutory appeal of the removal question under 28 U. S. C. § 1292 (b). When the trial court denied its motion for a preliminary injunction, respondent appealed but did not raise the removal issue; and in affirming the denial of the preliminary injunction, the Court of Appeals did not discuss the question. 487 F. 2d 312 (CA3 1973).

The District Court then conducted a six-day trial on the merits and concluded that petitioner was entitled to injunctive relief. 374 F. Supp. 52 (1974). Respondent then appealed from the final judgment. This time it also raised the removal question. The Court of Appeals ruled that this appeal represented the first opportunity that LCL had to have the District Court's decision denying remand reviewed. There thus had been no waiver of the removal question, and this Court's decision in *Grubbs* v. *General Electric Credit Corp.*, 405 U. S. 699 (1972), had no application. The Court of Appeals then reversed

the District Court on the removal question and ordered a remand to the state court. 506 F. 2d 339 (1974).

In holding that the refusal to remand a removal case could not be raised on an appeal from a denial of a preliminary injunction, the decision of the Court of Appeals departs from its prior holding in *Mayflower Industries* v. *Thor Corp.*, 184 F. 2d 537, 538 (1950), cert. denied, 341 U. S. 903 (1951), and conflicts with the decisions of other Courts of Appeals in *Beech-Nut, Inc.* v. *Warner-Lambert Co.*, 480 F. 2d 801 (CA2 1973), and *Kysor Industrial Corp.* v. *Pet, Inc.*, 459 F. 2d 1010, 1011 (CA6), cert. denied, 409 U. S. 980 (1972). Furthermore, it would appear that jurisdictional questions should be reviewed at the first available opportunity, and I perceive no good reason for not permitting the removal issue to be raised in connection with an appeal from the denial of a preliminary injunction.* Had that course been followed here, six days of trial and a decision on the merits would not have been wasted. Also, if it were to be held that the appeal on the injunction issue is a suitable occasion for considering the remand question, then *Grubbs, supra,* should be extended so as to *require* that the question be raised on such an appeal. Other-

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*The authorities relied upon by the Court of Appeals—*Chicago, R. I. & P. R. Co.* v. *Stude*, 346 U. S. 574, 578 (1954); *Wilkins* v. *American Export-Isbrandtsen Lines, Inc.*, 401 F. 2d 151 (CA2 (1968); C. Wright, Law of Federal Courts § 41, p. 147 (2d ed. 1970)—support the principle that the denial of a motion for remand alone is not a basis for appeal, but they do not support the lower court's decision that the removal question cannot be raised upon appeal from the denial of an interlocutory injunction. Petitioner's position on that issue is supported by *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940), which held that the District Court's denial of motions to dismiss could be reviewed by the Court of Appeals upon an appeal from the granting of an interlocutory injunction.

wise, wasteful litigation is invited, and the losing party on the merits is given another bite at the apple.

I would grant certiorari in this case to resolve the conflict among the Circuits.

No. 74–1061. ANDERSON, WARDEN, ET AL. *v.* RADCLIFF ET AL. C. A. 10th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 509 F. 2d 1093.

Rehearing Denied

No. 73–1148. DECOTEAU, NATURAL MOTHER AND NEXT FRIEND OF FEATHER ET AL. *v.* DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT, 420 U. S. 425;

No. 73–1500. ERICKSON, WARDEN *v.* UNITED STATES EX REL. FEATHER ET AL., 420 U. S. 425; and

No. 74–5776. FAHRIG ET AL. *v.* COTTERMAN ET AL., 420 U. S. 915. Petitions for rehearing denied.

No. 74–875. BURTON ET AL. *v.* WALLER, GOVERNOR OF MISSISSIPPI, ET AL., 420 U. S. 964. Motion of Members of the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted. Petition for rehearing denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL dissent from the denial of this petition.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit for the period June 2 and 3, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

APRIL 28, 1975*

Appeals Dismissed

No. 74–238. NATIONAL LIBERTY LIFE INSURANCE CO. *v.* WISCONSIN. Appeal from Sup. Ct. Wis. This appeal having been made expressly contingent upon a grant of certiorari in No. 74–193, *Wisconsin* v. *National Liberty Life Insurance Co.*, and the petition for writ of certiorari in No. 74–193 having been denied today, *infra*, p. 947, the appeal is dismissed. Reported below: 62 Wis. 2d 347, 215 N. W. 2d 26.

No. 74–1001. NATIONAL BROADCASTING CO., INC., ET AL. *v.* UNITED STATES. Appeal from D. C. C. D. Cal. dismissed for want of jurisdiction. MR. JUSTICE REHNQUIST dissents.

Vacated and Remanded on Appeal

No. 74–793. MARKS ET AL. *v.* LEIS, PROSECUTOR OF HAMILTON COUNTY, ET AL. Appeal from D. C. S. D. Ohio. Judgment vacated and cause remanded for further consideration in light of *Sosna* v. *Iowa*, 419 U. S. 393 (1975), and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Nuisance proceedings were begun against appellants in Ohio courts on the theory that the some of the books sold in a bookstore on premises owned by one appellant and leased by the others were obscene, and that the bookstore was therefore a nuisance. The Ohio statutory scheme underlying these nuisance proceedings is outlined in *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975).

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of No. 74–903, *Dyke* v. *Georgia*, *infra*, p. 952.

Appellants filed suit in Federal District Court while the state proceedings were pending seeking injunctions against the state proceedings. The parties agreed not to go forward with the state-court proceedings until the Federal District Court litigation was completed. The federal court refused to enjoin the state proceedings, because it believed that Ohio could treat as a nuisance and close for a year a bookstore which sold some obscene materials, without running afoul of the constitutional proscriptions against prior restraint of materials protected by the First Amendment.

A similar issue was presented on the merits in *Huffman, supra.* However, the Court refused to pass on the merits, because it believed that the federal court was barred from intervening in the state proceedings. The Court now remands this case for further consideration in light of *Huffman, supra,* and *Sosna* v. *Iowa,* 419 U. S. 393 (1975). But I think it clear that even if *Huffman* was correctly decided, see 420 U. S., at 613 (BRENNAN, J., dissenting), it does not govern this case. Here, the prosecuting authorities expressly agreed to submit to federal-court jurisdiction, and they do not in this Court argue that the District Court could not have enjoined the state proceedings even if it believed them unconstitutional. Thus, any reliance on the principles of *Younger* v. *Harris,* 401 U. S. 37 (1971), has been waived. See *Sosna* v. *Iowa, supra,* at 396 n. 3.

I need not reach the question of whether the Ohio scheme constitutes an impermissible prior restraint upon books never judicially determined to be obscene, because I believe that suppression even of specific books adjudicated obscene in nuisance proceedings is unconstitutional.

Ohio defines obscenity as follows:

"(A) Any material or performance is 'obscene' if,

when considered as a whole and judged with reference to ordinary adults, any of the following apply:

"(1) Its dominant appeal is to prurient interest;

"(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

"(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

"(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose." Ohio Rev. Code Ann. § 2905.34 (Supp. 1972), now Ohio Rev. Code Ann. § 2907.01 (1975).

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, when tested by that constitutional standard, § 2905.34, is unconstitutionally overbroad and therefore facially invalid. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), suppression of any materials whatever on

the basis of the definition of obscenity in § 2905.34 is, in my view, impermissible. Because the judgment of the District Court was rendered after *Miller,* I would reverse.

No. 74–1242. CUSTOM RECORDING CO., INC. *v.* BLANTON, GOVERNOR OF TENNESSEE, ET AL. Appeal from D. C. M. D. Tenn. Judgment vacated and case remanded so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Sixth Circuit. *MTM, Inc.* v. *Baxley,* 420 U. S. 799 (1975).

Certiorari Granted—Vacated and Remanded

No. 73–1827. UNITED STATES ET AL. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Bisceglia,* 420 U. S. 141 (1975). MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would deny the petition. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.* Reported below: 488 F. 2d 953.

No. 73–1884. JONES *v.* KENTUCKY. Ct. App. Ky. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Drope* v. *Missouri,* 420 U. S. 162 (1975). Reported below: 503 S. W. 2d 757.

No. 74–36. UNITED STATES *v.* LEWIS. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Serfass* v. *United States,* 420 U. S. 377 (1975). Reported below: 492 F. 2d 126.

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*See also note, *supra,* p. 940.

No. 74–5246. IVES *v.* UNITED STATES. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Drope* v. *Missouri*, 420 U. S. 162 (1975). Reported below: 504 F. 2d 935.

*Miscellaneous Orders**

No. ———. OPPENHEIMER *v.* LOS ANGELES COUNTY FLOOD CONTROL DISTRICT ET AL. C. A. 9th Cir. Motion to dispense with printing petition for writ of certiorari denied. *Snider* v. *All State Administrators, Inc.*, 414 U. S. 685 (1974).

No. A–816. GRANT ET UX. *v.* FIRST WESTERN BANK, AKA LLOYDS BANK, ET AL. C. A. 9th Cir. Application for stay of order of the United States District Court for the Central District of California, entered on March 3, 1975, denied.

No. A–853 (74–1302). DUNLOP, SECRETARY OF LABOR, ET AL. *v.* TURNER ELKHORN MINING CO. ET AL. Application for stay of order of the United States District Court for the Eastern District of Kentucky, entered on November 20, 1974, presented to MR. JUSTICE STEWART, and by him referred to the Court, granted pending final disposition of appeal by this Court. Reported below: 385 F. Supp. 424.

No. 74–754. UNITED STATES *v.* MANDUJANO. C. A. 5th Cir. [Certiorari granted, 420 U. S. 989.] Motion for appointment of counsel granted. It is ordered that Michael Allen Peters, Esquire, of Houston, Tex., be, and he is hereby, appointed to serve as counsel for respondent in this case.

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*For Court's orders prescribing Bankruptcy Rules and Official Bankruptcy Forms, see *post*, p. 1021.

No. A–863. EXXON CORP. ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY;

No. A–864. TEXAS CHEMICAL COUNCIL *v.* ENVIRONMENTAL PROTECTION AGENCY; and

No. A–875. HARRIS COUNTY ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY. Applications for stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied. MR. JUSTICE POWELL took no part in the consideration or decision of these applications.* Reported below: 499 F. 2d 289.

No. 73–1869. BEER ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, 419 U. S. 822.] Case restored to calendar for reargument.

No. 74–742. FOREMOST-MCKESSON, INC. *v.* PROVIDENT SECURITIES CO. C. A. 9th Cir. [Certiorari granted, 420 U. S. 923.] Motion of Allis-Chalmers Manufacturing Co. for leave to file a brief as *amicus curiae* granted.

No. 74–1047. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* GAUTREAUX ET AL. C. A. 7th Cir. Motion of Housing Authority of Elgin, Ill., for leave to file a brief as *amicus curiae* denied.

No. 74–5822. HAMPTON, AKA BYERS *v.* UNITED STATES. C. A. 8th Cir. [Certiorari granted, 420 U. S. 1003.] Motion for appointment of counsel granted. It is ordered that David A. Lang, Esquire, of St. Louis, Mo., be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 74–1028. TERZIAN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

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*See also note, *supra*, p. 940.

No. 74–6047. BROWN *v.* BRITT, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–1049. SULLIVAN, CORRECTIONS COMMISSIONER, ET AL. *v.* JOHNSON, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 74–940. COLORADO RIVER WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES; and

No. 74–949. AKIN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 504 F. 2d 115.

No. 74–5808. FRANCIS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 496 F. 2d 896.

Certiorari Denied

No. 73–1175. BERKOWITZ ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 488 F. 2d 1235.

No. 73–6493. VELAZQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 29.

No. 74–193. WISCONSIN *v.* NATIONAL LIBERTY LIFE INSURANCE CO. Sup. Ct. Wis. Certiorari denied. Reported below: 62 Wis. 2d 347, 215 N. W. 2d 26.

No. 74–519. FRANKEL *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC. Ct. App. N. Y. Certiorari denied.

No. 74–922. HOWARD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–810. DELP *v.* OHIO. Ct. App. Ohio, Columbiana County. Certiorari denied.

No. 74–923. FERRARA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1051.

No. 74–925. MAITA *v.* WHITMORE, SHERIFF. C. A. 9th Cir. Certiorari denied. Reported below: 508 F. 2d 143.

No. 74–934. HUESTON ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 34 N. Y. 2d 116, 312 N. E. 2d 462.

No. 74–951. BOHN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1145.

No. 74–953. SCHULLO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1200.

No. 74–967. CARTIER *v.* SECRETARY OF STATE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 130, 506 F. 2d 191.

No. 74–995. CIRAOLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1278.

No. 74–994. SCHOOL COMMITTEE OF SPRINGFIELD *v.* BOARD OF EDUCATION ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 319 N. E. 2d 427.

No. 74–1034. BAIN ET UX. *v.* MAY DEPARTMENT STORES CO. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–964. ONE 1973 CADILLAC FLEETWOOD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–972. HONNEUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 508 F. 2d 566.

No. 74–1046. BLANKNER *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 504 F. 2d 1037.

No. 74–1071. YELLOWSTONE PINE CO. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 205 Ct. Cl. 867, 506 F. 2d 1406.

No. 74–1101. GLOBE INDEMNITY CO. *v.* WILLIAMS. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 837.

No. 74–1104. CITIZENS COMMITTEE FOR FARADAY WOOD ET AL. *v.* LINDSAY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 1065.

No. 74–1108. REPUBLIC INDUSTRIES, INC. *v.* ELECTRONICS CORPORATION OF AMERICA. C. A. 1st Cir. Certiorari denied. Reported below: 507 F. 2d 409.

No. 74 1111. UNITED STATES STEEL CORP. *v.* DICKERSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 74–1118. CHUGACH NATIVE ASSN. ET AL. *v.* CENTRAL COUNCIL OF TLINGIT & HAIDA INDIANS OF ALASKA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 502 F. 2d 1323.

No. 74–1119. ALABAMA ET AL. *v.* NEWMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1320.

No. 74–1135. PACKARD *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–1146. CIA DE NAV. MAR. NETUMAR *v.* CONCEICAO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 437.

No. 74–1147. HARWELL, ADMINISTRATRIX *v.* WESTCHESTER FIRE INSURANCE CO., A DIVISION OF CRUM & FORSTER INSURANCE COS. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1245.

No. 74–1149. FIRST NATIONAL BANK & TRUST CO., CHICKASHA, OKLAHOMA *v.* CONTINENTAL INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 2d 7.

No. 74–1154. WHITNEY ET AL. *v.* TSOSIE ET UX. Ct. App. N. M. Certiorari denied.

No. 74–1225. DORGAN, TAX COMMISSIONER OF NORTH DAKOTA *v.* MESSNER ET UX. Sup. Ct. N. D. Certiorari denied.

No. 74–5854. HARSHAW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–5861. OUZTS *v.* MARYLAND NATIONAL INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 505 F. 2d 547.

No. 74–5872. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 2d 826.

No. 74–5956. MUNDT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 F. 2d 904.

No. 74–5966. SERRANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 1323.

No. 74–5971. SPIVEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 F. 2d 146.

No. 74–5977. PAPADAKIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 287.

No. 74–5990. THOMAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–5999. CALHOUN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 861.

No. 74–6002. FOSTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 444.

No. 74–6008. KURTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 971.

No. 74–6025. HINCHMAN *v.* LOCAL UNION 130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS. Sup. Ct. La. Certiorari denied.

No. 74–6026. MOREFIELD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 975.

No. 74–6056. BECKHAM, AKA MOTLEY, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1316.

No. 74–6057. GETZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 971.

No. 74–6067. HUTSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6069. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 1271.

No. 74–6070. BARFIELD *v.* UNITED STATES; and
No. 74–6095. HALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 53.

No. 74–6081. TESTAMARK *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 496 F. 2d 641.

No. 74–6130. WOODEN *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 74–6132. OWENS *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 74–6139. LIVINGSTON *v.* CIVIL SERVICE COMMISSION OF THE CITY OF TUCSON ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 22 Ariz. App. 183, 525 P. 2d 949.

No. 74–6157. WICKS *v.* GRAY, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–6165. JOHNSON *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Sup. Ct. Cal. Certiorari denied.

No. 74–6170. JUNCO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 419, 321 N. E. 2d 875.

No. 74–6173. ZANDERS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 515 S. W. 2d 907.

No. 74–6174. BUSSEY *v.* OKLAHOMA CITY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6179. GUNTER *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 87 N. M. 71, 529 P. 2d 297.

No. 74–6183. LEMASTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6200. PROSTROLLO *v.* BOWEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 775.

No. 74–1142. SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari.

No. 74–903. DYKE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California*, 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 232 Ga. 817, 209 S. E. 2d 166.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Criminal Court of Fulton County, Ga., of exhibiting an allegedly obscene film in violation of Ga. Code Ann. § 26–2101 (1972), which provides in pertinent part as follows:

> "(a) A person commits the offense of distributing obscene materials when he . . . exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof . . . ."

"Obscene" is defined in § 26–2101 (b), which provides in pertinent part:

> "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and ut-

terly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

The Supreme Court of Georgia affirmed.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, the definition of "obscene" contained in § 26–2101 is unconstitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Supreme Court of Georgia was rendered after *Miller*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 74–5911. DACHSTEINER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 518 F. 2d 20.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of California of using the mails to distribute allegedly obscene materials in violation of 18 U. S. C. § 1461, which provides in pertinent part as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
>
> . . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Ninth Circuit affirmed.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would

therefore grant certiorari, and since the judgment of the Court of Appeals for the Ninth Circuit was rendered after *Orito*, reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed materials was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

Rehearing Denied

No. 74–751. COX, FORMER ASSISTANT DIRECTOR FOR TREATMENT, VIRGINIA DIVISION OF CORRECTIONS, ET AL. *v.* COOK, 420 U. S. 734;

No. 74–5741. HARDWICK *v.* CALDWELL, WARDEN, 420 U. S. 996; and

No. 74–5810. MAY *v.* UNITED STATES, 420 U. S. 996. Petitions for rehearing denied.

No. 74–5793. PADILLA *v.* NEW MEXICO, 420 U. S. 937. Motion for leave to file petition for rehearing denied.

MAY 5, 1975

Dismissal Under Rule 60

No. 74–1113. NATIONAL STEEL CARRIERS ASSN., INC. *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Mich. dismissed under this Court's Rule 60.

MAY 12, 1975*

Affirmed on Appeal

No. 74–912. STACY ET AL. *v.* MAHAN ET AL. Affirmed on appeal from D. C. E. D. Va.

No. 74–1029. CHICAGO & EASTERN ILLINOIS RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. D. Ill. Reported below: 384 F. Supp. 298.

No. 74–1210. SADLAK *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL. Affirmed on appeal from D. C. N. D. Ohio.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–912, *Stacy* v. *Mahan*, *infra*, this page; No. 74–932, *Lekometros* v. *United States*, *infra*, p. 962; No. 74–955, *Art Theater Guild, Inc.* v. *Ohio ex rel. Schoen*, *infra*, p. 957; No. 74–956, *Art Theater Guild, Inc.* v. *Ohio ex rel. Anderson*, *infra*, p. 957; No. 74–984, *Maver* v. *Loesch*, *infra*, p. 962; No. 74–989, *United States Clay Producers Traffic Assn., Inc.* v. *Central of Georgia R. Co.*, *infra*, p. 957; No. 74–1021, *Rosselli* v. *United States*, *infra*, p. 962; No. 74–1029, *Chicago & Eastern Illinois R. Co.* v. *United States*, *infra*, this page; No. 74–1033, *Dann* v. *Johnston*, *infra*, p. 962; No. 74–1035, *Stitt* v. *United States*, *infra*, p. 962; No. 74–1084, *Anderson* v. *Langenwalter*, *infra*, p. 962; No. 74–1093, *Riley* v. *Estate of Riley*, *infra*, p. 971; No. 74–1095, *Denton* v. *United States*, *infra*, p. 963; No. 74–1102, *National Maritime Union of America, AFL–CIO* v. *National Labor Relations Board*, *infra*, p. 963; No. 74–1125, *Bernstein* v. *United States*, *infra*, p. 962; No. 74–1131, *Kalamazoo Board of Education* v. *Oliver*, *infra*, p. 963; No. 74–1132, *Michigan State Board of Education* v. *Oliver*, *infra*, p. 963; No. 74–1148, *Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, *infra*, p. 961; No. 74–1158, *Smart* v. *Texas Power & Light Co.*, *infra*, p. 958; No. 74–1188, *Kerrigan* v. *Morgan*, *infra*, p. 963; No. 74–1190, *White* v. *Morgan*, *infra*, p. 963; No. 74–1196, *Kline* v. *Coldwell, Banker & Co.*, *infra*, p. 963; No. 74–1197, *White* v. *McIntosh*, *infra*, p. 957; No. 74–1199, *Brown* v. *Wood*, *infra*, p. 963; No. 74–1210, *Sadlak* v. *Gilligan*, *infra*, this page; and No. 74–6227, *John* v. *United States*, *infra*, p. 962.

No. 74–989. UNITED STATES CLAY PRODUCERS TRAFFIC ASSN., INC., ET AL. *v.* CENTRAL OF GEORGIA RAILROAD CO. ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 379 F. Supp. 976.

Appeals Dismissed

No. 74–955. ART THEATER GUILD, INC., ET AL. *v.* OHIO EX REL. SCHOEN; and

No. 74–956. ART THEATER GUILD, INC., ET AL. *v.* OHIO EX REL. ANDERSON. Appeals from Ct. App. Ohio, Lucas County, dismissed for failure to file notices of appeal within the time provided by this Court's Rule 11 and 28 U. S. C. § 2101 (c).

No. 74–1197. WHITE *v.* MCINTOSH ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–5852. WHITMARSH *v.* MASSACHUSETTS. Appeal from Dist. Ct. N. Norfolk County dismissed for want of jurisdiction. Reported below: See —— Mass. ——, 316 N. E. 2d 610.

No. 74–6015. CROSS *v.* VILLEGAS ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 74–6233. MANION *v.* MILBREN, INC. Appeal from C. A. 4th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 74–691. SCHMIDT, SECRETARY, DEPARTMENT OF HEALTH AND SOCIAL SERVICES OF WISCONSIN, ET AL. *v.*

LESSARD. Appeal from D. C. E. D. Wis. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). Reported below: See 349 F. Supp. 1078.

No. 74–952. BLANTON, GOVERNOR OF TENNESSEE, ET AL. *v.* AMERICANS UNITED FOR THE SEPARATION OF CHURCH AND STATE ET AL. D. C. M. D. Tenn. The Court, being advised that after probable jurisdiction herein was noted on March 24, 1975, 420 U. S. 989, the State's Tuition Grant statutory program was amended, judgment vacated and case remanded to District Court for reconsideration in light of statutory changes effected since the litigation was instituted. Reported below: 384 F. Supp. 714.

No. 74–1158. SMART *v.* TEXAS POWER & LIGHT CO. ET AL. Appeal from D. C. N. D. Tex. Judgment vacated and case remanded so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90 (1974).

Miscellaneous Orders

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. The United States has moved the Court to retain jurisdiction in this case to entertain such further proceedings, enter such orders, and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to the decision of March 17, 1975, and to the Court's opinion issued on that date [420 U. S. 515]. Motion of the United States granted. The parties, jointly or separately, are requested within 60 days to submit for the Court's consideration a proposed decree effectuating the March 17 decision and opinion, retaining jurisdiction over such supplemental proceedings as may

be necessary or advisable and, more specifically, making provision for appropriate proceedings in this Court to establish the coastline of defendant States and the seaward boundary between the seabed lands of the States and those of the United States.

No. A–928. BLACKBURN *v.* CITY OF MAPLE HEIGHTS. Sup. Ct. Ohio. Application for stay of execution and enforcement of judgment of Garfield Heights Municipal Court entered on December 5, 1973, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–36. IN RE DISBARMENT OF BOMSTEIN. It having been reported to this Court that Stanley J. Bomstein, of Baltimore, Md., has resigned with prejudice from the Court of Appeals of Maryland, and this Court by order of January 20, 1975 [419 U. S. 1118], having suspended the said Stanley J. Bomstein from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said Stanley J. Bomstein, be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–37. IN RE DISBARMENT OF HANKINSON. It having been reported to this Court that Christopher Ker Hankinson, of Vienna, Va., has been disbarred from the practice of law in the United States Court of Appeals for the District of Columbia Circuit and in the United States District Court for the District of Colum-

bia, and this Court by order of January 20, 1975 [419 U. S. 1119], having suspended the said Christopher Ker Hankinson from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said Christopher Ker Hankinson be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–39. IN RE DISBARMENT OF ROSENBERG. It having been reported to this Court that Harvey Rosenberg, of Silver Spring, Md., has been disbarred from the practice of law in the Court of Appeals of Maryland and this Court by order of February 24, 1975 [420 U. S. 941], having suspended the said Harvey Rosenberg from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said Harvey Rosenberg be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 74–492. OHIO *v.* GALLAGHER. Sup. Ct. Ohio. [Certiorari granted, 420 U. S. 1003.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1380. CHEMEHUEVI TRIBE OF INDIANS ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–1666. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL.; and

No. 73–1667. FEDERAL POWER COMMISSION *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL., 420 U. S. 395. Motion of Chemehuevi Tribe of Indians et al. to retax costs denied.

No. 74–775. CITY OF NEW ORLEANS ET AL. *v.* DUKES, DBA LOUISIANA CONCESSIONS. C. A. 5th Cir. [Probable jurisdiction postponed, *ante*, p. 908.] Motion of appellee for appointment of counsel denied.

No. 74–6027. BEGUN *v.* UNITED STATES;

No. 74–6235. BEGUN *v.* STATE BOARD OF MEDICAL EXAMINERS ET AL.; and

No. 74–6237. MYLES *v.* RYDEL, WORKHOUSE SUPERINTENDENT. Motions for leave to file petitions for writs of certiorari denied.

No. 74–6314. MILLS *v.* AULT, CORRECTIONS DIRECTOR;

No. 74–6332. COLE *v.* TENNESSEE; and

No. 74–6350. SMITH *v.* PUTMAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–5657. REID *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT;

No. 74–6019. STEELE *v.* SUPREME COURT OF COLORADO ET AL.; and

No. 74–6142. STURGEON *v.* HEANEY, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 74–1148. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* COTTRELL, HEALTH OFFICER OF MISSISSIPPI. Ap-

peal from D. C. S. D. Miss. Probable jurisdiction noted. Reported below: 383 F. Supp. 569.

Certiorari Granted

No. 74–1033. DANN, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* JOHNSTON. C. C. P. A. Motion of Computer & Business Equipment Manufacturers Assn. (CBEMA) for leave to file a brief as *amicus curiae* and certiorari granted. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition.* Reported below: 502 F. 2d 765.

No. 74–1047. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT *v.* GAUTREAUX ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 503 F. 2d 930.

Certiorari Denied. (See also Nos. 74–1197 and 74–6233, *supra.*)

No. 74–932. LEKOMETROS *v.* UNITED STATES;

No. 74–1125. BERNSTEIN *v.* UNITED STATES; and

No. 74–6227. JOHN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1134.

No. 74–984. MAYER *v.* LOESCH ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–1021. ROSSELLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 1352.

No. 74–1035. STITT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 971.

No. 74–1084. ANDERSON *v.* LANGENWALTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 846.

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*See also note, *supra*, p. 956.

No. 74–1095. DENTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 188.

No. 74–1102. NATIONAL MARITIME UNION OF AMERICA, AFL-CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1052.

No. 74–1131. KALAMAZOO BOARD OF EDUCATION *v.* OLIVER, BY JONES, ET AL.; and

No. 74–1132. MICHIGAN STATE BOARD OF EDUCATION ET AL. *v.* OLIVER, BY JONES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 178.

No. 74–1188. KERRIGAN ET AL. *v.* MORGAN ET AL.; and

No. 74–1190. WHITE, MAYOR OF BOSTON, ET AL. *v.* MORGAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 509 F. 2d 580.

No. 74–1196. KLINE ET AL. *v.* COLDWELL, BANKER & CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 508 F. 2d 226.

No. 74–1199. BROWN ET UX. *v.* WOOD, JUDGE, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 257 Ark. 252, 516 S. W. 2d 98.

No. 74–375. SHELL CHEMICAL CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 495 F. 2d 1116.

No. 74–736. WASHINGTON RESEARCH PROJECT, INC. *v.* DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 164 U. S. App. D. C. 169, 504 F. 2d 238.

No. 74–906. PARKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 498 F. 2d 625.

No. 74–950. BARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 505 F. 2d 1091.

No. 74–1014. MEISTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 504 F. 2d 505.

No. 74–1050. LICHTIG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–1051. VON LEWINSKI *v.* PEPITONE, ACTING DIRECTOR, SELECTIVE SERVICE SYSTEM, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 74–1056. DROBACK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 625.

No. 74–1066. CIRAMI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 69.

No. 74–1082. IN RE GROSSGOLD. Sup. Ct. Ill. Certiorari denied. Reported below: 58 Ill. 2d 9, 317 N. E. 2d 45.

No. 74–1127. FUJITA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 43 Cal. App. 3d 454, 117 Cal. Rptr. 757.

No. 74–1134. PAVLICKA *v.* NEW YORK UNIVERSITY MEDICAL CENTER. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 74–1150. SIDOR *v.* SELLMAN. Super. Ct. N. J. Certiorari denied.

No. 74–1157. IN RE BERLANT. Sup. Ct. Pa. Certiorari denied. Reported below: 458 Pa. 439, 328 A. 2d 471.

No. 74–1175. DELTA AIR LINES, INC. *v.* McDONNELL DOUGLAS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 239.

No. 74–1176. BRUBAKER ET AL. *v.* BOARD OF EDUCATION, SCHOOL DISTRICT No. 149, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 502 F. 2d 973.

No. 74–1182. UNITED BROADCASTING CO., INC., ET AL. *v.* ARMES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 766.

No. 74–1183. EASTERBROOK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 74–1186. MOYA ET VIR *v.* CHILILI COOPERATIVE ASSN., INC., ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 87 N. M. 99, 529 P. 2d 1220.

No. 74–1191. ILIGAN INTEGRATED STEEL MILLS, INC., ET AL. *v.* THE JOHN WEYERHAEUSER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 68.

No. 74–1208. TANGLEWOOD MALL, INC. *v.* CHASE MANHATTAN BANK (NATIONAL ASSOCIATION), TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 838.

No. 74–1211. NORTH AMERICAN ROCKWELL CORP. *v.* KNAPP. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 361.

No. 74–1212. ST. PAUL FIRE & MARINE INSURANCE CO. *v.* HAWKEYE CHEMICAL CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 322.

No. 74–1230. SNELLING *v.* CHELTENHAM NATIONAL BANK. Super. Ct. Pa. Certiorari denied. Reported below: 230 Pa. Super. 498, 326 A. 2d 557.

No. 74–1291. FRED *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 531 P. 2d 1038.

No. 74–5800. MOODY *v.* UNITED STATES BOARD OF PAROLE. C. A. 5th Cir. Certiorari denied.

No. 74–5890. MAGEE *v.* BRITT, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 74–5909. KIMBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–5919. SPYCHALA *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–5922. CROSIER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–5925. NORMAN, AKA ANA *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 302 So. 2d 254.

No. 74–5948. CLARK *v.* RODRIGUEZ, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–5955. TURLEY *v.* MISSOURI. Ct. App. Mo., St. Louis District. Certiorari denied. Reported below: 518 S. W. 2d 207.

No. 74–5958. JEFFERY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–5997. TOOTEN *v.* SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 173.

No. 74–5998. DINSIO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–6020. TERRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–6022. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 416.

No. 74–6032. BATTLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 791.

No. 74–6033. SULLIVAN *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 493 F. 2d 855.

No. 74–6036. CREW *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1053.

No. 74–6037. MEDINA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1303.

No. 74–6041. BARNHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–6044. ISAAC, AKA PITTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1237.

No. 74–6048. MARTIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 1211.

No. 74–6050. RUFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 839.

No. 74–6052. PIGMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 837.

No. 74–6062. PARKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6075. CANSECO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1054.

No. 74–6074. RODRIGUEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–6077. MUNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 507 F. 2d 563.

No. 74–6083. HINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 967.

No. 74–6087. TAYLOR ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–6089. ESCAMILLA *v.* BOGUE, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 74–6093. TATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–6097. BERMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 975.

No. 74–6104. BUCHERT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 507 F. 2d 629.

No. 74–6111. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 406.

No. 74–6117. GAUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–6122. HARRELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 74–6123. PERKINS *v.* BALL, SOCIAL SECURITY COMMISSIONER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1405.

No. 74–6131. MORROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6134. CULOTTA *v.* PICKETT. C. A. 7th Cir. Certiorari denied. Reported below: 506 F. 2d 1061.

No. 74–6137. ROBINSON *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 506 F. 2d 923.

No. 74–6140. MADER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1394.

No. 74–6144. HAVANSEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 1405.

No. 74–6163. FIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 967.

No. 74–6187. WILLIAMS *v.* FORTNER, PRISON SUPERINTENDENT. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1279.

No. 74–6190. GREENLEE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 285 N. C. 761, 209 S. E. 2d 285.

No. 74–6192. HUGHES *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 529 P. 2d 510.

No. 74–6197. PATTERSON *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–6208. WRIGHT *v.* LUEDDEMANN ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–6210. BRAXTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 1403.

No. 74–6213. ELLERBEE *v.* MARLBORO COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–6218. RODGERS *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6214. NULL *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 340.

No. 74–6219. LUGO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–6222. SMITH ET AL. *v.* LINK, GOVERNOR OF NORTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied.

No. 74–6225. OLDEN *v.* GUNN, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 74–6230. HAMPTON *v.* KARFELD, TRUSTEE. C. A. 8th Cir. Certiorari denied.

No. 74–6239. JOHNSON *v.* DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6242. STANLEY *v.* WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1404.

No. 74–6243. HOM *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–6245. GERSBACHER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 23 Ill. App. 3d 136, 318 N. E. 2d 685.

No. 74–6250. HILL *v.* CITY OF DETROIT ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–6258. TAHL *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–6275. SCHNEIDER *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6279. VITORATOS *v.* CARDWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 74–6266. ROLON *v.* REGAN, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6365. DAVIS *v.* CHATTANOOGA FEDERAL SAVINGS & LOAN ASSN. CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–863. PENNSYLVANIA *v.* WHITE. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing the judgment below rests upon adequate state grounds. Reported below: 459 Pa. 84, 327 A. 2d 40.

No. 74–1093. RILEY ET AL. *v.* ESTATE OF RILEY. Sup. Ct. Pa. Certiorari denied, it appearing that the judgment below rests upon adequate state grounds. Reported below: 459 Pa. 428, 329 A. 2d 511.

No. 74–1172. GARCIA ET AL. *v.* GRAY ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 507 F. 2d 539.

No. 74–5912. HURST *v.* HUNT, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari.

No. 74–6177. PERKINS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 516 S. W. 2d 873.

Rehearing Denied

No. 73–296. HUFFMAN ET AL. *v.* PURSUE, LTD., 420 U. S. 592;

No. 74–576. STERRETT ET AL. *v.* TAYLOR ET AL., 420 U. S. 983; and

No. 74–680. BLUMBERG *v.* BAUSCH & LOMB OPTICAL CO., 420 U. S. 927. Petitions for rehearing denied.

No. 74–5711. O'BRIEN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, 420 U. S. 1005;

No. 74–5812. SCHALL ET AL. *v.* UNITED STATES, 420 U. S. 993;

No. 74–5886. STRAWN *v.* UNITED STATES, 420 U. S. 1006; and

No. 74–6011. PORZUCZEK, GUARDIAN *v.* COUNTY OF SAN MATEO ET AL., 420 U. S. 1007. Petitions for rehearing denied.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE), 420 U. S. 529. Petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.*

No. 74–97. DIAMOND ET AL. *v.* BLAND, SHERIFF, ET AL., 419 U. S. 885 and 1097. Motion for leave to file second petition for rehearing denied.

No. 74–893. THE SVENDBORG ET AL. *v.* MARINE ENGINE SPECIALTIES CORP., 420 U. S. 964;

No. 74–5407. MASSENGALE *v.* UNITED STATES, 419 U. S. 1091; and

No. 74–5981. KONJEVIC ET VIR *v.* FLORIDA DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION, 420 U. S. 995. Motions for leave to file petitions for rehearing denied.

MAY 19, 1975

Affirmed on Appeal

No. 74–1120. MURGIA *v.* MASSACHUSETTS BOARD OF RETIREMENT ET AL. Affirmed on appeal from D. C. Mass. Reported below: 386 F. Supp. 179.

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*See also note, *supra*, p. 956.

Appeals Dismissed

No. 74–1081. HANSEN *v.* BOARD OF INSPECTORS OF ELECTION, 8TH ELECTION DISTRICT, 68TH ASSEMBLY DISTRICT OF NEW YORK, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 45 App. Div. 2d 988, 360 N. Y. S. 2d 207.

No. 74–1178. COLLINS ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 35 N. Y. 2d 547, 324 N. E. 2d 113.

No. 74–1193. SANFORD ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 35 N. Y. 2d 547, 324 N. E. 2d 113.

No. 74–1255. MILLER *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 74–6249. CONRAD ET UX. *v.* MEYER & KAUCHER ET AL. Appeal from C. A. 8th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Reversed and Remanded. (See No. 74–1128, *ante*, p. 482.)

Miscellaneous Orders

No. A–365 (74–6458). SHADD *v.* HOGAN, WARDEN. C. A. 3d Cir. Application for bail, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 74–712. UNITED STATES *v.* BORNSTEIN ET AL. C. A. 3d Cir. [Certiorari granted, 420 U. S. 906.] Motion of respondent Page for leave to proceed further herein *in forma pauperis* denied. *Snider* v. *All State Administrators, Inc.*, 414 U. S. 685 (1974).

No. 74–884. UNITED STATES *v.* POWELL. C. A. 9th Cir. [Certiorari granted, 420 U. S. 971.] Motions of respondent for leave to proceed further herein *in forma pauperis* and for appointment of counsel granted. It is ordered that Jerry J. Moberg, Esquire, of Moses Lake, Wash., is appointed to serve as counsel for respondent in this case.

No. 74–1107. CAPPAERT ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion to defer consideration of petition for writ of certiorari granted pending further order of this Court.

No. 74–6224. COLLIER *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT; and

No. 74–6267. CALLINAN ET AL. *v.* GARRITY, U. S. DISTRICT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

Probable Jurisdiction Noted

No. 74–1044. MASSACHUSETTS BOARD OF RETIREMENT ET AL. *v.* MURGIA. Appeal from D. C. Mass. Probable

jurisdiction noted. Reported below: 376 F. Supp. 753 and 386 F. Supp. 179.

Certiorari Granted

No. 74–1110. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL. *v.* SIMON, SECRETARY OF THE TREASURY, ET AL.; and

No. 74–1124. SIMON, SECRETARY OF THE TREASURY, ET AL. *v.* EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated, and a total of one hour allotted for oral argument. Reported below: 165 U. S. App. D. C. 239, 506 F. 2d 1278.

Certiorari Denied. (See also Nos. 74–1255 and 74–6249, *supra.*)

No. 74–896. BURLINGTON NORTHERN, INC. *v.* AMERICAN RAILWAY SUPERVISORS ASSN. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 503 F. 2d 58.

No. 74–1006. LEWIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 504 F. 2d 92.

No. 74–1030. WILSON *v.* OREGON STATE BAR ET AL. Sup. Ct. Ore. Certiorari denied.

No. 74–1052. HUNT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 931.

No. 74–1075. DEVITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 499 F. 2d 135.

No. 74–1080. LANCASTER ET AL. *v.* UNITED STATES; and

No. 74–1114. DEL PIETRO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 510 F. 2d 1307.

No. 74–1100. BRADY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 1050.

No. 74–1112. PRICE *v.* COTTON, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–1117. CONDOR OPERATING CO. ET AL. *v.* ZARB, ADMINISTRATOR, FEDERAL ENERGY ADMINISTRATION, ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 514 F. 2d 351.

No. 74–1126. LOCAL UNION 396, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 1075.

No. 74–1155. PENN-DIXIE CEMENT CORP. ET AL. *v.* SCHLICK. C. A. 2d Cir. Certiorari denied. Reported below: 507 F. 2d 374.

No. 74–1177. MILHAN *v.* MILHAN. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 3d 129, 528 P. 2d 1145.

No. 74–1226. MCBETH ET UX. *v.* UNITED PRESS INTERNATIONAL, INC. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 959.

No. 74–1236. TYSON *v.* VIRGIN ISLANDS NATIONAL BANK. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 802.

No. 74–5984. MONSIVAIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 675.

No. 74–6066. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–6029. SARLES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 294 So. 2d 95.

No. 74–6000. TRUJILLO-HERNANDEZ *v.* FARRELL, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 954.

No. 74–6068. ENTREKIN *v.* UNITED STATES; and
No. 74–6169. ENTREKIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 508 F. 2d 1328.

No. 74–6092. BORASKY *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 874.

No. 74–6096. TOOKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 971.

No. 74–6106. SILMAN, AKA LONG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6125. MASON *v.* TEHAN, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied.

No. 74–6127. STROY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 283, 506 F. 2d 1322.

No. 74–6129. HAMILTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74–6136. BOLAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6141. REDMAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 840.

No. 74–6155. DOWD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1055.

No. 74–6178. BORUSKI *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 204 Ct. Cl. 807.

No. 74–998. FOWLER ET AL. *v.* OREGON. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 18 Ore. App. 486, 525 P. 2d 1061.

No. 74–1011. MICHAELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 511 F. 2d 882.

No. 74–1059. FORTH CORP. ET AL. *v.* ALLEGHENY AIRLINES, INC., ET AL.; and

No. 74–1223. UNITED STATES *v.* ALLEGHENY AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 504 F. 2d 104.

No. 74 1060. FORTH CORP. ET AL. *v.* ALLEGHENY AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 504 F. 2d 400.

No. 74–1083. SCHAEFER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 510 F. 2d 1307.

No. 74–1105. FORREST ET AL., DBA FORREST & KIEFER *v.* CAPITAL BUILDING & LOAN ASSN. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 504 F. 2d 891.

No. 74–1109. PROCTER & GAMBLE CO. ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 509 F. 2d 69.

No. 74–1200. DUFFY *v.* BARNES ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 508 F. 2d 205.

No. 74–1238. DEPARTMENT OF REVENUE OF WASHINGTON *v.* CARRINGTON CO. Sup. Ct. Wash. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 84 Wash. 2d 444, 527 P. 2d 74.

No. 74–5961. CORMIER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 303 So. 2d 743.

No. 74–6164. GALLOWAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 326 A. 2d 803.

No. 74–1138. KALB ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 506.

No. 74–6273. WARE *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 506 F. 2d 1405.

No. 74–6274. VERGA *v.* VERGA, AKA VIRGA. Super. Ct. N. J. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6276. SMITH, TRUSTEE IN BANKRUPTCY *v.* BRYANT ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 502 F. 2d 784.

No. 74–6288. WILEY *v.* MCMANUS, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6280. MACKEY *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6284. HAMMOND *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6285. SINCLAIR *v.* HENDERSON, WARDEN; and No. 74–6286. SINCLAIR *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6290. QUICK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–6291. DEDMON *v.* ENOMOTO, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–1116. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 508 F. 2d 1157.

No. 74–1156. FRILETTE ET AL. *v.* KIMBERLIN ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE WHITE would grant certiorari. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 508 F. 2d 205.

Rehearing Denied

No. 74–514. JOHNSON *v.* UNITED STATES, 420 U. S. 972;

No. 74–767. CHU *v.* UNITED STATES, 420 U. S. 940;

No. 74–844. ORAM *v.* GENERAL AMERICAN OIL COMPANY OF TEXAS ET AL., 420 U. S. 964;

No. 74–1002. TAYLOR'S WELDING SERVICE, INC., ET AL. *v.* BELL, *ante*, p. 911;

No. 74–6078. DARNOLD *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT, *ante*, p. 919; and

No. 74–6232. HARRELSON *v.* UNITED STATES ET AL., *ante*, p. 928. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

No. 74–5573. RONAN *v.* BRIGGS ET AL., 420 U. S. 911. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fourth Circuit on May 6, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit during the period beginning October 12, 1975, and ending October 17, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered

entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

MAY 27, 1975

Vacated and Remanded on Appeal

No. 74–339. WOLMAN ET AL. *v.* ESSEX ET AL. Appeal from D. C. S. D. Ohio. Judgment vacated and case remanded for further consideration in light of *Meek* v. *Pittenger, ante,* p. 349. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal.

No. 74–1221. CIVIL SERVICE COMMISSION OF NEW YORK ET AL. *v.* SNEAD. Appeal from D. C. S. D. N. Y. Judgment vacated and case remanded for consideration of question of mootness. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would affirm the judgment. Reported below: 389 F. Supp. 935.

Appeals Dismissed

No. 74–1153. KACHER *v.* PITTSBURGH NATIONAL BANK ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–1258. E. F. JOHNSON CO. *v.* COMMISSIONER OF TAXATION. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this appeal. Reported below: 302 Minn. 236, 224 N. W. 2d 150.

Certiorari Granted—Vacated and Remanded

No. 74–506. TAYLOR ET AL. *v.* PERINI, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 6th Cir. Certiorari

granted, judgment vacated, and case remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society, ante,* p. 240. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 503 F. 2d 899.

No. 74–558. SKEHAN *v.* BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society, ante,* p. 240, and *Wood* v. *Strickland,* 420 U. S. 308 (1975). MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case. Reported below: 501 F. 2d 31.

No. 74–1247. STANTON, ADMINISTRATOR, DEPARTMENT OF PUBLIC WELFARE OF INDIANA, ET AL. *v.* GREEN ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Burns* v. *Alcala,* 420 U. S. 575 (1975). MR. JUSTICE DOUGLAS would deny the petition for writ of certiorari. Reported below: 499 F. 2d 155.

Miscellaneous Orders

No. A–931. BRINGE *v.* COLLINS ET AL. Application for stay of execution and enforcement of judgment of Court of Appeals of Maryland, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application. Reported below: 274 Md. 338, 335 A. 2d 670.

No. D 32. IN RE DISBARMENT OF GERMAISE. It having been reported to this Court that Irwin L. Germaise, of New York, N. Y., has been disbarred from the practice of law in all of the courts in the State of New York, and

this Court by order of January 13, 1975 [419 U. S. 1102], having suspended the said Irwin L. Germaise from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

It is ordered that the said Irwin L. Germaise, be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. D–33. IN RE DISBARMENT OF MCDONALD. It having been reported to this Court that Ronald F. McDonald, Jr., of Rockville, Md., has been disbarred from the practice of law in the Court of Appeals of Maryland, and this Court by order of January 20, 1975 [419 U. S. 1118], having suspended the said Ronald F. McDonald, Jr., from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said Ronald F. McDonald, Jr., be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. D–42. IN RE DISBARMENT OF DEAN. It having been reported to this Court that John W. Dean III, of Los Angeles, Cal., has been disbarred from the practice

of law in the United States District Court for the District of Columbia, and this Court by order of February 24, 1975 [420 U. S. 942], having suspended the said John W. Dean III, from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that the time within which to file a return has expired;

It is ordered that the said John W. Dean III, be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

MR. JUSTICE DOUGLAS and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this matter.

No. 74–492. OHIO *v.* GALLAGHER. Sup. Ct. Ohio. [Certiorari granted, 420 U. S. 1003.] Motion of respondent for appointment of counsel granted and Jack T. Schwarz, Esquire, of Dayton, Ohio, is appointed to serve as counsel for respondent in this case. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 74–850. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WEBER. C. A. 9th Cir. [Certiorari granted, 420 U. S. 989.] Peter David Ehrenhaft, Esquire, of Washington, D. C., is invited to brief and argue this case as *amicus curiae* in support of judgment below. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this order.

No. 74–6457. GOODSPEED *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

No. 74–878. NATIONAL LEAGUE OF CITIES ET AL. *v.* DUNLOP, SECRETARY OF LABOR; and

No. 74–879. CALIFORNIA *v.* DUNLOP, SECRETARY OF LABOR. Appeals from D. C. D. C. [Probable jurisdiction noted, 420 U. S. 906.] Cases restored to calendar for reargument.

No. 74–1254. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MOBIL OIL CORP., MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–1203. PHELPS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 74–6329. MAGEE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. Motion for leave to file petition for writ of prohibition and/or mandamus denied. MR. JUSTICE DOUGLAS would grant the motion.

Probable Jurisdiction Noted

No. 74–1267. EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS ET AL. *v.* FLORES DE OTERO; EXAMINING BOARD OF ENGINEERS, ARCHITECTS AND SURVEYORS ET AL. *v.* PEREZ NOGUEIRO. Appeals from D. C. P. R. Probable jurisdiction noted. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Application for stay of execution and enforcement of judgments, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, granted pending issuance of judgment of this Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this application.

Certiorari Granted

No. 74–1023. KERR ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 511 F. 2d 192.

No. 74–1245. LIBERTY MUTUAL INSURANCE CO. *v.* WETZEL ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 511 F. 2d 199.

No. 74–1269. BARRY, COMMISSIONER, SUFFOLK COUNTY POLICE DEPARTMENT *v.* DWEN. C. A. 2d Cir. Certiorari granted. Reported below: 508 F. 2d 836.

No. 74–768. BROWN *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari granted. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 507 F. 2d 1300.

No. 74–1141. UNITED STATES *v.* GADDIS ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 506 F. 2d 352.

No. 74–1216. RISTAINO ET AL. *v.* ROSS. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 508 F. 2d 754.

Certiorari Denied. (See also No. 74–1153, *supra.*)

No. 74–991. COSTANZA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 844.

No. 74–1019. GARGOTTO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 409.

No. 74–1054. CREWS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 286 N. C. 41, 209 S. E. 2d 462.

No. 74–1069. WHITAKER ET UX. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 283, 506 F. 2d 1322.

No. 74–1098. ABBAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 123.

No. 74–1139. CLARK ET AL. *v.* STANKIVIC ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 729.

No. 74–1166. MINNESOTA ET AL. *v.* MINNESOTA CIVIL LIBERTIES UNION ET AL.;

No. 74–1167. LARKIN ET AL. *v.* MINNESOTA CIVIL LIBERTIES UNION ET AL.; and

No. 74–1168. QUAST ET AL. *v.* MINNESOTA CIVIL LIBERTIES UNION ET AL. Sup. Ct. Minn. Certiorari denied. Reported below: 302 Minn. 216, 224 N. W. 2d 344.

No. 74–1174. AIR LINE DISPATCHERS' ASSN. ET AL. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 282, 506 F. 2d 1321.

No. 74–1248. ARMSTRONG CORK CO. *v.* CONGOLEUM INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 334.

No. 74–1251. THOMAS *v.* FORD MOTOR CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–1253. HOWARD *v.* BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO. C. A. 10th Cir. Certiorari denied.

No. 74–1280. NAT HARRISON ASSOCIATES, INC. *v.* LOUISVILLE GAS & ELECTRIC CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 511.

No. 74–6049. WEBB *v.* CULBERTSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–6073. CONWAY ET AL. *v.* HAWKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 506 F. 2d 1397.

No. 74–6082. MITCHELL *v.* VIRGINIA. Sup Ct. Va. Certiorari denied.

No. 74–6107. LANCER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 719.

No. 74–6113. CARTER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–6146. HOCKADAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 326 A. 2d 254.

No. 74–6148. ANDRADE-GONZALEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6149. STEVENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 683.

No. 74–6151. ISOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 756.

No. 74–6166. BATTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–6171. RUTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 510 F. 2d 970.

No. 74–6180. RICO *v.* UNITED STATES; and

No. 74–6193. SALAS-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1279.

No. 74–6182. KENYON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74 6189. HOFFMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6198. BOSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6199. BRINLEE *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6201. MORANDI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 968.

No. 74–6270. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–6310. BRANTLEY *v.* BAXLEY ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–6312. CARTER *v.* CHIPPER'S NUT HUT, INC. C. A. 5th Cir. Certiorari denied.

No. 74–6315. JAMES *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6316. BURSTON *v.* CALDWELL, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 24.

No. 74–6317. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 54 Ala. App. 187, 306 So. 2d 55.

No. 74–6326. YOUNG *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 202, 361 N. Y. S. 2d 762.

No. 74–6333. ROLL *v.* CALIFORNIA. Sup Ct. Cal. Certiorari denied.

No. 74–6360. FAIR *v.* BALL ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 304 So. 2d 126.

No. 74–6396. GIBSON *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied.

No. 74–403. JORDON ET AL. *v.* GILLIGAN, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 500 F. 2d 701.

No. 74–543. BRIDGEPORT GUARDIANS, INC., ET AL. *v.* BRIDGEPORT CIVIL SERVICE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 497 F. 2d 1113.

No. 74–757. CITIZENS TO PRESERVE OVERTON PARK, INC., ET AL. *v.* SMITH, COMMISSIONER, TENNESSEE DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–842. TIDEE PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 163 U. S. App. D. C. 347, 502 F. 2d 349.

No. 74–1140. LOWE ET AL. *v.* SECRETARY OF STATE ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–1173. ESTATE OF KLEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 507 F. 2d 617.

No. 74–1185. FIRESTONE PLASTICS CO., DIVISION OF FIRESTONE TIRE & RUBBER CO., ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 509 F. 2d 1301.

No. 74–961. DILLON *v.* ANTLER LAND COMPANY OF WYOLA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 507 F. 2d 940.

No. 74–1090. TERRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 508 F. 2d 841.

No. 74–1164. ALFRED A. KNOPF, INC., ET AL. *v.* COLBY, DIRECTOR, CENTRAL INTELLIGENCE AGENCY, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 509 F. 2d 1362.

No. 74–1268. CITY OF CHICAGO ET AL. *v.* CHICAGO AREA MILITARY PROJECT ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 508 F. 2d 921.

No. 74–1279. SUTT ET AL. *v.* FIRST NATIONAL BANK OF KANSAS CITY ET AL. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–6079. BEARD *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 59 Ill. 2d 220, 319 N. E. 2d 745.

No. 74–6094. GOLON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 511 F. 2d 298.

No. 74–1240. WEISER ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 912.

No. 74–6153. BAECHLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 509 F. 2d 13.

No. 74–6305. BENNETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–1003. RIDENS ET AL. *v.* ILLINOIS ET AL. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view that any state or federal ban on, or regulation of, obscenity is prohibited by the Constitution, *Roth* v. *United States,* 354 U. S. 476, 508–514 (1957) (DOUGLAS, J., dissenting); *Miller* v. *California,* 413 U. S. 15, 42–47 (1973) (DOUGLAS, J., dissenting); *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 70–73 (1973) (DOUGLAS, J., dissenting), would grant certiorari and summarily reverse the judgment. Reported below: 59 Ill. 2d 362, 321 N. E. 2d 264.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioners were convicted of selling allegedly obscene publications in violation of the Illinois Obscenity Statute, Ill. Rev. Stat., c. 38, § 11–20 (1969), and the obscenity ordinance of the city of Moline, Ill. The Illinois Supreme Court affirmed their convictions. 51 Ill. 2d 410, 282 N. E. 2d 691 (1972). We granted certiorari and remanded the case for further consideration in light of *Miller* v. *California,* 413 U. S. 15 (1973).

413 U. S. 912 (1973). On remand, the Illinois Supreme Court again affirmed the convictions.

For the reasons stated in my dissent from the remand of this case, *id.*, at 911, and because the present judgment was rendered after *Miller*, I would grant certiorari and reverse.*

No. 74–1024. SIERRA CLUB *v.* HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 5th Cir. Motion of Citizens for Better Environment et al. for leave to join in petition for writ of certiorari denied. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition. Reported below: 502 F. 2d 43.

No. 74–1065. ILLINOIS *v.* GRAYSON. Sup. Ct. Ill. Certiorari denied, it appearing the judgment below rests upon adequate state grounds. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 58 Ill. 2d 260, 319 N. E. 2d 43.

Rehearing Denied

No. 74–926. CITY OF PITTSBURGH *v.* PUBLIC PARKING AUTHORITY OF PITTSBURGH ET AL., *ante*, p. 912;

No. 74–930. ILLINOIS ET AL. *v.* FEDERAL POWER COMMISSION ET AL., *ante*, p. 912;

No. 74–5964. OLENZ *v.* CLEARY ET AL., 420 U. S. 994; and

No. 74–6034. WHITE *v.* MICHIGAN STATE UNIVERSITY, *ante*, p. 918. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

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*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

JUNE 2, 1975*

Affirmed on Appeal

No. 74–1027. GARCIA ET AL. *v.* TEXAS STATE BOARD OF MEDICAL EXAMINERS ET AL. Affirmed on appeal from D. C. W. D. Tex. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 384 F. Supp. 434.

Appeals Dismissed

No. 74–1289. PHAGAN *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 2d Sup. Jud. Dist., dismissed for want

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 73–1285, *Wood* v. *Strickland*, *infra*, p. 997; No. 74–1027, *Garcia* v. *Texas State Board of Medical Examiners*, *infra*, this page; No. 74–1057, *Commodity Option Co.* v. *Bernhardt*, *infra*, p. 1004; No. 74–1062, *Caldwell* v. *City of New Orleans*, *infra*, p. 1003; No. 74–1072, *Henderson* v. *Donivan*, *infra*, p. 996; No. 74–1076, *Washington* v. *Murray*, *infra*, p. 1004; No. 74–1085, *Matteo* v. *United States*, *infra*, p. 998; No. 74–1097, *Consumers Union of United States* v. *Kissinger*, *infra*, p. 1004; No. 74–1121, *Hood* v. *United States*, *infra*, p. 998; No. 74–1133, *Strauss* v. *United States*, *infra*, p. 998; No. 74–1143, *Indiviglio* v. *United States*, *infra*, p. 998; No. 74–1160, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, *infra*, p. 1004; No. 74–1218, *Allen Homes, Inc.* v. *Weersing*, *infra*, p. 998; No. 74–1244, *Brundage* v. *United States*, *infra*, p. 998; No. 74–1270, *Train* v. *Colorado Public Interest Research Group, Inc.*, *infra*, p. 998; No. 74–1271, *H & R Block, Inc.* v. *Havenfield Corp.*, *infra*, p. 999; No. 74–1272, *Local 542, International Union of Operating Engineers* v. *Higginbotham*, *infra*, p. 999; No. 74–1278, *Lovelace* v. *DeChamplain*, *infra*, p. 996; No. 74–1287, *Weinstein* v. *Bradford*, *infra*, p. 998; No. 74–1308, *Lundvall* v. *Kuiper*, *infra*, p. 996; No. 74–6072, *Jackson* v. *Illinois*, *infra*, p. 999; No. 74–6108, *Moore* v. *United States*, *infra*, p. 999; No. 74–6121, *Saunders* v. *Foltz*, *infra*, p. 999; No. 74–6161, *Breen* v. *United States*, *infra*, p. 998; No. 74–6238, *Geelan* v. *United States*, *infra*, p. 999; and No. 74–6357, *Roots* v. *Wainwright*, *infra*, p. 996.

of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 509 S. W. 2d 703.

No. 74–1308. LUNDVALL *v.* KUIPER ET AL. Appeal from Sup. Ct. Colo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 187 Colo. 40, 529 P. 2d 1328.

No. 74–6357. ROOTS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 74–948. UNITED STATES *v.* SANFORD ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Serfass* v. *United States,* 420 U. S. 377 (1975). Reported below: 503 F. 2d 291.

No. 74–1072. HENDERSON, WARDEN *v.* DONIVAN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for consideration of question of mootness. Reported below: 503 F. 2d 1401.

No. 74–1278. LOVELACE ET AL. *v.* DECHAMPLAIN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the Western District of Missouri with directions to dismiss cause as moot. Reported below: 510 F. 2d 419.

Miscellaneous Orders

No. A–944. CANNEY *v.* FLORIDA. Application for stay of execution and enforcement of judgment of the District Court of Appeal of Florida, Second District, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 298 So. 2d 495.

No. A–967. SMILOW *v.* UNITED STATES. Application for injunction pending appeal to the United States Court of Appeals for the Second Circuit, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–981. NEWSPAPERS, INC., DBA AUSTIN AMERICAN-STATESMAN *v.* BLACKWELL, JUDGE. Application for stay of order of 147th Judicial District Court of Travis County, Tex., presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant the application. THE CHIEF JUSTICE took no part in the consideration or decision of this application.*

No. 74–6358. SHINDER *v.* ESMIOL. Motion for leave to file petition for writ of certiorari denied.

No. 74–538. UNITED STATES *v.* WATSON. C. A. 9th Cir. [Certiorari granted, 420 U. S. 924.] Motion for appointment of counsel is granted, and Michael D. Nasatir, Esquire, of Beverly Hills, Cal., is appointed to serve as counsel for respondent in this case.

No. 73–1285. WOOD ET AL. *v.* STRICKLAND ET AL., 420 U. S. 308. Motion of respondents to retax costs granted and it is ordered that petitioners and respondents divide the costs equally.

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*See also note, *supra*, p. 995.

No. 74–6292. SACASAS *v.* HOGAN, WARDEN; and

No. 74–6478. MINK *v.* EGELER, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 74–1270. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL. C. A. 10th Cir. Motion of Boston Edison Co. et al. for leave to file a brief as *amici curiae* and certiorari granted. Reported below: 507 F. 2d 743.

No. 74–1287. WEINSTEIN ET AL. *v.* BRADFORD ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 519 F. 2d 728.

Certiorari Denied. (See also Nos. 74–1289, 74–1308, and 74–6357, *supra.*)

No. 74–1085. MATTEO *v.* UNITED STATES;

No. 74–1143. INDIVIGLIO *v.* UNITED STATES; and

No. 74–6161. BREEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 968.

No. 74–1121. HOOD, AKA HAWKINS, ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–1133. STRAUSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 74–1218. ALLEN HOMES, INC. *v.* WEERSING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 510 F. 2d 360.

No. 74–1244. BRUNDAGE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 205 Ct. Cl. 502, 504 F. 2d 1382.

No. 74–1271. H & R BLOCK, INC. *v.* HAVENFIELD CORP. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 1263.

No. 74–1272. LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS *v.* HIGGINBOTHAM, U. S. DISTRICT JUDGE. C. A. 3d Cir. Certiorari denied.

No. 74–6072. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 74–6108. MOORE ET AL. *v.* UNITED STATES; and
No. 74–6238. GEELAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 737.

No. 74–6121. SAUNDERS ET AL. *v.* FOLTZ, DEPUTY WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 73–1768. DUFF *v.* FAIN. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 488 F. 2d 218.

No. 74–750. DAVIS, CORRECTIONS DIRECTOR, ET AL. *v.* LEWIS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 504 F. 2d 426.

No. 74–954. SHARP, JUDGE, ET AL. *v.* COBELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 503 F. 2d 790.

No. 74–1020. ALLSTATE MORTGAGE CORP. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 507 F. 2d 492.

No. 74–1039. ZYCHINSKI ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 637.

No. 74–1129. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 898.

No. 74–1145. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 659.

No. 74–1189. AMERICAN STANDARD, INC. *v.* CRANE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 1043.

No. 74–1195. WATERFRONT GUARD ASSOCIATION, LOCAL 1852, INDEPENDENT WATCHMEN'S ASSOCIATION OF THE PORT OF BALTIMORE, MARYLAND *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 839.

No. 74–1206. ZIONS FIRST NATIONAL BANK, EXECUTOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 506 F. 2d 1144.

No. 74–1215. T. J. FALGOUT BOATS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 508 F. 2d 855.

No. 74–1232. BELTRONICS, INC. *v.* EBERLINE INSTRUMENT CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 509 F. 2d 1316.

No. 74–5248. ANDERSON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 272 Md. 85, 321 A. 2d 516.

No. 74–6128. KNIGHT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 963.

No. 74–6133. TEDDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 287 So. 2d 330.

No. 74–6147. O'DONNELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 1190.

No. 74–6152. LUJAN *v.* GENGLER, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 62.

No. 74–6156. RIED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6172. CAGLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 729.

No. 74–6181. WARREN, AKA CHUNN *v.* UNITED STATES. C. A. 2d Cir.;

No. 74–6268. WARREN, AKA CHUNN *v.* UNITED STATES; and

No. 74–6269. WARREN, AKA CHUNN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 968 (first case); 509 F. 2d 575 (next two cases).

No. 74–6185. HURT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1398.

No. 74–6188. BOSTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 1171.

No. 74–6194. RICHARDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–6217. ROSAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 115 and 509 F. 2d 805.

No. 74–6196. HOLLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 38.

No. 74–6204. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6206. LAWRENCE *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–6209. FLORES *v.* MCCUNE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 74–6221. VAN BUREN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 513 F. 2d 1327.

No. 74–6229. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 967.

No. 74–6234. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 2d 15.

No. 74–6240. MOORE *v.* UNITED STATES; and
No. 74–6256. MORROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 840.

No. 74–6244. LEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 50, 506 F. 2d 111.

No. 74–6265. STABLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–6277. RETHORST *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 623.

No. 74–6343. DAYE *v.* BOUNDS, CORRECTION COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 509 F. 2d 66.

No. 74–6346. MILLER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 74-6349. GRAYTON *v.* ENOMOTO, CORRECTIONS DIRECTOR. C. A. 9th Cir. Certiorari denied.

No. 74-6351. MCCLINDON *v.* GRIGGS, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74-6353. DUNKER *v.* VINZANT. C. A. 1st Cir. Certiorari denied. Reported below: 505 F. 2d 503.

No. 74-6356. DAVIDSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 74-6359. BELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 74-6361. BRASWELL *v.* GRAY, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 74-6362. BROWN *v.* OREGON EX REL. JUVENILE DEPARTMENT FOR LANE COUNTY. Ct. App. Ore. Certiorari denied. Reported below: 19 Ore. App. 427, 528 P. 2d 569.

No. 74-6363. HEALEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 74-6364. HARDAWAY *v.* SHERMAN ENTERPRISES, INC., ET AL. Ct. App. Ga. Certiorari denied. Reported below: 133 Ga. App. 181, 210 S. E. 2d 363.

No. 74-6367. MARTINEZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 74-6404. SHARPE *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 74-1062. CALDWELL *v.* CITY OF NEW ORLEANS. Crim. Dist. Ct. La., Orleans Parish. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74-6416. DENMAN ET AL. *v.* ATKINS ET AL. C. A. 1st Cir. Certiorari denied.

No. 74–1057. COMMODITY OPTION CO., INC., ET AL. *v.* BERNHARDT ET AL. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 187 Colo. 89, 528 P. 2d 919.

No. 74–1097. CONSUMERS UNION OF UNITED STATES, INC. *v.* KISSINGER, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 165 U. S. App. D. C. 75, 506 F. 2d 136.

No. 74–1160. GEORGE R. WHITTEN, JR., INC., DBA WHITTEN CORP. *v.* PADDOCK POOL BUILDERS, INC., ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 508 F. 2d 547.

No. 74–1076. WASHINGTON *v.* MURRAY, AKA TERRY, ET AL. Sup Ct. Wash. Motion of respondent Murray for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 84 Wash. 2d 527, 527 P. 2d 1303.

No. 74–1130. FRIEDMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 506 F. 2d 511.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner Sooner State News Agency was convicted in the United States District Court for the Eastern District of Arkansas of transporting obscene literature through the United States mail in violation of 18 U. S. C. § 1465, which provides in pertinent part as follows:

> "Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph

recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Petitioners Friedman, Mitchum, Fishman, and Boyd were convicted in the same District Court of conspiracy to violate 18 U. S. C. § 1465. 18 U. S. C. § 371. The Court of Appeals for the Eighth Circuit affirmed all petitioners' convictions. 506 F. 2d 511 (1974).

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1465, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgments of the Court of Appeals for the Eighth Circuit were rendered after *Orito*, reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it does not appear from the petition and response that the obscenity of the disputed material was adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioners must be given an opportunity to have their cases decided on, and to introduce evidence relevant to, the legal standard upon which their

convictions have ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgments below and remand for a determination whether petitioners should be afforded a new trial under local community standards.

Rehearing Denied

No. 74–1037. ALLIGATOR CO., INC. *v.* LA CHEMISE LACOSTE ET AL., *ante*, p. 937;

No. 74–1171. GABRIEL ET AL. *v.* LEVIN ET AL., *ante*, p. 915; and

No. 74–5950. TALK *v.* UNITED STATES, *ante*, p. 932. Petitions for rehearing denied.

No. 74–5906. BROGAN *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 420 U. S. 1006. Motion for leave to file petition for rehearing denied.

JUNE 3, 1975

Dismissal Under Rule 60

No. 74–1300. LOUISIANA *v.* HERMAN. Sup. Ct. La. Certiorari dismissed under this Court's Rule 60. Reported below: 304 So. 2d 322.

JUNE 4, 1975

Dismissal Under Rule 60

No. 74–6344. DUHART *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 511 F. 2d 7.

JUNE 9, 1975

Affirmed on Appeal

No. 74–1296. WATER TRANSPORT ASSN. ET AL. *v.* UNITED STATES ET AL.; and

No. 74–1297. AMERICAN WATERWAYS OPERATORS, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from

D. C. D. C. MR. JUSTICE POWELL took no part in the consideration or decision of these appeals. Reported below: 386 F. Supp. 799.

Appeals Dismissed

No. 74–487. CLOVER BOTTOM HOSPITAL & SCHOOL *v.* TOWNSEND ET AL. Appeal from Sup. Ct. Tenn. Motion of appellees for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and case. Reported below: 513 S. W. 2d 505.

No. 74–1091. FARRELL *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. MR. JUSTICE STEWART would dismiss the appeal as untimely docketed. Reported below: 223 N. W. 2d 270.

No. 74–1380. GRUND *v.* ALDRIDGE ET AL. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 293 Ala. 333, 302 So. 2d 847.

No. 74–6366. HART ET UX. *v.* FEHSEKE ET AL. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–6313. MAISEL *v.* UNITED STATES ET AL. Appeal from D. C. W. D. N. Y. dismissed.

Miscellaneous Orders

No. ———. IN RE RESIGNATION OF CARDEN. Motion of Philip M. Carden, of Nashville, Tenn., to resign as a member of the Bar of this Court is granted. It is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. D–49. IN RE DISBARMENT OF ISHLER. It is ordered that Loren Grant Ishler, of Toledo, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this matter.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). Motion of Special Master for allowance of compensation granted and it is ordered that such costs be borne equally by the parties to this litigation. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier orders herein, see, *e. g.*, 420 U. S. 904.]

No. 74–389. ALBEMARLE PAPER CO. ET AL. *v.* MOODY ET AL. C. A. 4th Cir. [Certiorari granted, 419 U. S. 1068.] Motion of petitioners for leave to file supplemental brief after argument granted. MR. JUSTICE DOUGLAS and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 74–6321. STRATTON *v.* GROSSMAN ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 74–850. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WEBER. C. A. 9th Cir. [Certiorari granted, 420 U. S. 989.] Motion to dispense with printing appendix granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 74–891. PAUL ET AL. *v.* DAVIS. C. A. 6th Cir. [Certiorari granted, *ante*, p. 909.] Motion of Americans for Effective Law Enforcement, Inc., et al., for leave to file a brief as *amici curiae* granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 74–1213. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE, ET AL. *v.* HOMEMAKERS, INC., OF LOS ANGELES. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–1216. RISTAINO ET AL. *v.* ROSS. C. A. 1st Cir. [Certiorari granted, *ante*, p. 987.] Motion for appointment of counsel granted and Michael G. West, Esquire, of Springfield, Mass., is appointed to serve as counsel for respondent in this case. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 74–5808. FRANCIS *v.* HENDERSON, WARDEN. C. A. 5th Cir. [Certiorari granted, *ante*, p. 946.] Motion of petitioner for appointment of counsel granted and Bruce S. Rogow, Esquire, of Miami, Fla., is appointed to serve as counsel for petitioner in this case.

No. 74–6584. LIPSMAN *v.* GIARDINO ET AL. C. A. 2d Cir. Motion to expedite consideration of petition for writ of certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 74–1302. DUNLOP, SECRETARY OF LABOR, ET AL. *v.* TURNER ELKHORN MINING CO. ET AL.; and

No. 74–1316. TURNER ELKHORN MINING CO. ET AL. *v.* DUNLOP, SECRETARY OF LABOR, ET AL. Appeals from D. C. E. D. Ky. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 385 F. Supp. 424.

No. 74–1329. HYNES FT AL. *v.* MAYOR OF BOROUGH OF ORADELL ET AL. Appeal from Sup. Ct. N. J. Probable jurisdiction noted. Reported below: 66 N. J. 376, 331 A. 2d 277.

Certiorari Granted

No. 74–958. UNITED STATES ET AL. *v.* JANIS. C. A. 9th Cir. Certiorari granted.

No. 74–1179. UNITED STATES *v.* MILLER. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 500 F. 2d 751.

No. 74–1187. BAXTER ET AL. *v.* PALMIGIANO. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument with No. 74–1194, immediately *infra*. Reported below: 510 F. 2d 534.

No. 74–1194. ENOMOTO, CORRECTIONS DIRECTOR, ET AL. *v.* CLUTCHETTE ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Case set for oral argument with No. 74–1187, immediately *supra*. Reported below: 510 F. 2d 613.

Certiorari Denied. (See also Nos. 74–487, 74–1380, and 74–6366, *supra.*)

No. 74–1152. ARTEMIS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–1201. MIZANI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 967.

No. 74–1235. SIMS *v.* FOX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 857.

No. 74–1239. MITCHELL BROS. TRUCK LINES *v.* GILSTRAP ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 270 Ore. 599, 529 P. 2d 370.

No. 74–1288. LIBERTY MUTUAL INSURANCE CO. *v.* WETZEL ET AL.; and

No. 74–1319. WETZEL ET AL. *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 239.

No. 74–1299. SERVICE TECHNICIANS, INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 833, 513 F. 2d 638.

No. 74–1306. HONEYCUTT *v.* AETNA INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 340.

No. 74–1307. BOWMAN ET AL. *v.* PRESIDING JUDGE, SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–1311. HUDSON VALLEY ASBESTOS CORP. *v.* TOUGHER HEATING & PLUMBING CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 1140.

No. 74–1315. PLESS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–1320. ANDERSEN ET AL. *v.* FEAR. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 331.

No. 74–1321. FEYEN *v.* AMERICAN MAIL LINE, LTD. Sup. Ct. Ore. Certiorari denied. Reported below: 271 Ore. 76, 530 P. 2d 830.

No. 74–1325. DUGGAN ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS. C. A. 9th Cir. Certiorari denied. Reported below: 510 F. 2d 1086.

No. 74–1338. MELODY RECORDINGS, INC., ET AL. *v.* JONDORA MUSIC PUBLISHING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 392.

No. 74–1348. AUSTIN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 262 Ind. 529, 319 N. E. 2d 130.

No. 74–1356. RALEY *v.* NICHOLAS ET UX. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 2d 160.

No. 74–6167. HAWK *v.* SUPERIOR COURT OF CALIFORNIA, SOLANO COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 42 Cal. App. 3d 108, 116 Cal. Rptr. 713.

No. 74–6203. DANIEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 508 F. 2d 838.

No. 74–6205. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 840.

No. 74–6211. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6236. BURKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 672.

No. 74–6247. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 F. 2d 731.

No. 74–6253. BOERNER *v.* UNITED STATES;
No. 74–6261. BOERNER *v.* UNITED STATES; and
No. 74–6262. BEAUFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 1064.

No. 74–6255. GARDFREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 74–6260. SELLARO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 514 F. 2d 114.

No. 74–6281. WASSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 74–6282. BORUSKI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–6298. POLLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 601.

No. 74–6308. BARKER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 168 U. S. App. D. C. 312, 514 F. 2d 208.

No. 74–6325. BRANSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1404.

No. 74–6338. HALL *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 74–6339. HEMMINGER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–6372. CARTER *v.* BENNETT. C. A. 5th Cir. Certiorari denied.

No. 74–6373. CANNON *v.* DIRKER. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 843.

No. 74–6374. RAY *v.* KANE, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 74–6379. PORZUCZEK, GUARDIAN *v.* TOWNER ET AL. Sup. Ct. Cal. Certiorari denied.

No. 74–6385. BROCKMAN *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–6390. PATTERSON ET AL. *v.* AULT, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6392. DONOVAN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6393. THOMPSON *v.* MCMANUS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 2d 769.

No. 74–6400. WHITE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 517 S. W. 2d 543.

No. 74–6426. BRAGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 1302.

No. 74–6432. GREENE ET AL. *v.* CHANDLER, MAYOR OF MEMPHIS, ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–6456. ALBERTSON *v.* MICHIGAN. Cir. Ct., Berrien County, Mich. Certiorari denied.

No. 73–839. OHIO *v.* UNITED STATES. Temp. Emerg. Ct. App. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 487 F. 2d 936.

No. 73–1565. IOWA *v.* DUNLOP, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 494 F. 2d 100.

No. 74–739. UNITED STATES *v.* CALIFORNIA ET AL. Temp. Emerg. Ct. App. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 504 F. 2d 750.

No. 74–5979. FIDELER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 500 F. 2d 1182.

No. 74–6395. HEMSTREET *v.* NEMIR ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 74–1163. CRITZER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 510 F. 2d 967.

No. 74–1202. FIFTY-FIVE GAMBLING DEVICES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 505 F. 2d 658.

No. 74–1205. CHALE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 510 F. 2d 976.

No. 74–1305. SLOCA *v.* BAYNE. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–6220. SCHOFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 507 F. 2d 963.

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No. 74–1314. LOUISVILLE LODGE NO. 6, FRATERNAL ORDER OF POLICE, ET AL. *v.* BURTON, DIRECTOR OF PUBLIC SAFETY, ET AL. Ct. App. Ky. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 518 S. W. 2d 777.

No. 74–1370. LAKESIDE HOSPITAL ASSN. ET AL. *v.* FIRST NATIONAL BANK OF KANSAS CITY ET AL. Sup. Ct. Mo. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–6186. WILKINS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 286 N. C. 214, 209 S. E. 2d 318.

No. 74–6251. KIRBY *v.* STURGES, CHAIRMAN, PAROLE AND PARDON BOARD OF ILLINOIS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 510 F. 2d 397.

No. 74–6388. CRYER *v.* PRESTRESSED CONCRETE PRODUCTS CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 507 F. 2d 1278.

No. 74–6434. B. J. R. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 332 A. 2d 58.

No. 74–6401. BECKETT *v.* WARREN, ATTORNEY GENERAL OF WISCONSIN, ET AL. C. A. 7th Cir. Application for bail, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of the application. Reported below: 513 F. 2d 635.

Rehearing Denied

No. 73–6868. FERNANDEZ ET AL. *v.* UNITED STATES, 420 U. S. 990;

No. 74–916. RADISICH *v.* RADISICH, 420 U. S. 992; and

No. 74–1136. DERBY *v.* CONNECTICUT LIGHT & POWER Co., *ante*, p. 931. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

No. 74–80. KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. *v.* HELFANT; and

No. 74–277. HELFANT *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL., *ante*, p. 117. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 74–345. R. J. REYNOLDS TOBACCO CO. ET AL. *v.* AMERICAN PRESIDENT LINES, LTD., ET AL., 419 U. S. 1070. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion.

No. 74–817. Ross *v.* Ross, 420 U. S. 947. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit during the period June 23 to June 27, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Tenth Circuit during the week of July 7, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

BANKRUPTCY RULES AND OFFICIAL BANKRUPTCY FORMS

Effective August 1, 1975

The Bankruptcy Rules and Official Bankruptcy Forms were prescribed by the Supreme Court of the United States on April 28, 1975, pursuant to 28 U. S. C. § 2075, and were reported to the Congress by THE CHIEF JUSTICE on the same date. For letter of transmittal, see *post*, p. 1020. The Judicial Conference report referred to in that letter is not reproduced herein. These rules and forms became effective on August 1, 1975, as provided in paragraphs 2 of the Court's orders, *post*, pp. 1021 and 1022.

For earlier publication of Bankruptcy Rules and Forms, see, *e. g.*, 411 U. S. 989, 415 U. S. 1003.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 28, 1975

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to Congress the Rules and Official Forms governing proceedings under Chapters X and XII of the Bankruptcy Act prescribed pursuant to Title 28, United States Code, Section 2075. MR. JUSTICE DOUGLAS dissents from the action taken by the Court.

Accompanying these rules and forms is an excerpt from the Report of the Judicial Conference of the United States containing the Advisory Committee Notes which were submitted to the Court for its consideration pursuant to Title 28, United States Code, Section 331.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

MONDAY, APRIL 28, 1975

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States and annexed hereto, to be known as the Chapter X Rules and Official Chapter X Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings, and motions, and the practice and procedure under Chapter X of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra*, pp. 1023–1087.]

2. That the aforementioned Chapter X Rules and Official Chapter X Forms shall take effect on August 1, 1975, and shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Order in Bankruptcy 52, heretofore prescribed by this Court be, and it hereby is, abrogated, effective August 1, 1975.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned new Chapter X Rules and Official Chapter X Forms to the Congress in accordance with the provisions of Title 28, U. S. C. § 2075.

ORDERED:

1. That the rules and forms as approved by the Judicial Conference of the United States and annexed hereto,

to be known as the Chapter XII Rules and Official Chapter XII Forms, be, and they hereby are, prescribed pursuant to Section 2075, Title 28, United States Code, to govern the forms of process, writs, pleadings, and motions, and the practice and procedure under Chapter XII of the Bankruptcy Act, in the proceedings and to the extent set forth therein, in the United States district courts, the District Court for the District of the Canal Zone, and the District Courts of Guam and the Virgin Islands.

[See *infra*, pp. 1089–1134.]

2. That the aforementioned Chapter XII Rules and Official Chapter XII Forms shall take effect on August 1, 1975, and shall be applicable to proceedings then pending except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That General Orders in Bankruptcy Nos. 41 and 54 and Official Forms in Bankruptcy Nos. 53 to 57 inclusive, heretofore prescribed by this Court be, and they hereby are, abrogated, effective August 1, 1975.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit the aforementioned new Chapter XII Rules and Official Chapter XII Forms to the Congress in accordance with the provisions of Title 28, U. S. C. § 2075.

MR. JUSTICE DOUGLAS, dissenting.

As I have said before, "I cannot agree to the Court's submission of the proposed Bankruptcy Rules to the Congress." 411 U. S. 992 (1973). I once knew a good deal about bankruptcy law, but I no longer have the expertise to say whether the proposed rules are good or bad. Because this Court is no more than a "rubber stamp" I think it should not participate in the rule-making process. The Judicial Conference rather than this Court should send these rules to Congress if they are to be sent at all.

RULES OF BANKRUPTCY PROCEDURE

TITLE IV

CHAPTER X RULES

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TITLE IV

CHAPTER X RULES

Rule 10–1. Scope of Chapter X rules and forms; short title.

The rules and forms in this Title IV govern the procedure in courts of bankruptcy in cases under Chapter X of the Bankruptcy Act. These rules may be known and cited as the Chapter X Rules. These forms may be known and cited as the Official Chapter X Forms.

Rule 10–2. Meanings of words in the Bankruptcy Rules when applicable in a Chapter X case.

The following words and phrases used in the bankruptcy rules made applicable in Chapter X cases by these rules have the meanings herein indicated, unless they are inconsistent with the context:

(1) "Bankrupt" means "debtor."

(2) "Bankruptcy" or "bankruptcy case" means "Chapter X case."

(3) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the "receiver," "trustee," or "debtor continued in possession" in the Chapter X case.

PART I. PETITION AND PROCEEDINGS RELATING THERETO

Rule 10–101. Commencement of Chapter X case.

A Chapter X case is commenced by the filing with the court of a petition by or against a corporation, seeking relief under Chapter X of the Act.

Rule 10–102. Chapter X cases originally commenced under another chapter of the Act.

When a case commenced under another chapter of the Act proceeds under Chapter X, the Chapter X case shall be deemed to have been originally commenced as of the

date of the filing of the first petition initiating a case under the Act.

Rule 10–103. Reference of cases; withdrawal of reference and assignment.

(*a*) *Reference.*—(1) On the filing of a petition, if a local rule so provides, the clerk shall refer the case forthwith to a referee or to more than one referee concurrently as bankruptcy judge or judges. Thereafter all proceedings in the case shall be before the referee except as otherwise provided by subdivision (b) of this rule, by Bankruptcy Rule 920, by § 2a (15) of the Act when a complaint seeks an injunction to restrain a court, by § 43c of the Act when the office of the referee is vacant, and by the provisions in the Act and Part VIII of the Bankruptcy Rules governing appeals from judgments of the referee.

(2) If a local rule does not provide for automatic reference of a Chapter X case by the clerk, the case shall be assigned to a district judge, who may act himself or may, at any time during its pendency, refer the case to a referee or to more than one referee concurrently as bankruptcy judge or judges generally or for any specified purpose.

(*b*) *Withdrawal of reference and assignment.*—The district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district.

Rule 10–104. Voluntary petition and stay.

(*a*) *Form and number.*—A voluntary petition shall conform substantially to Official Form No. 10–1. If a bankruptcy case is pending by or against the debtor, any petition under this rule shall be filed therein and may be filed before or after adjudication. An original and 6 copies of the petition shall be filed, unless additional copies are required by local rule. The clerk of the district court or, when the petition is filed in a pending case,

the bankruptcy judge shall transmit one copy to the district director of internal revenue for the district in which the case is filed, one copy to the Secretary of the Treasury, and two copies to the Securities and Exchange Commission.

(*b*) *Stay.*—The filing of a petition in a pending bankruptcy case shall act as a stay of adjudication and of administration of an estate in bankruptcy.

Rule 10–105. Involuntary petition and stay.

(*a*) *Form and number.*—An involuntary petition shall conform substantially to Official Form No. 10–2. If a bankruptcy case is pending by or against the debtor, any petition under this rule shall be filed therein and may be filed before or after adjudication. The number and distribution of copies shall be as specified in Rule 10–104.

(*b*) *Transferor or transferee of claim.*—Bankruptcy Rule 104 (d) applies in Chapter X cases.

(*c*) *Joinder of petitioners after filing.*—Creditors other than the original petitioners may join in an involuntary petition at any time before its dismissal.

(*d*) *Stay.*—The filing of a petition in a pending bankruptcy case shall act as a stay of adjudication and of administration of an estate in bankruptcy.

Rule 10–106. Caption of petition.

The caption of every petition shall comply with Bankruptcy Rule 904 (b). In addition the title of the case as set forth in the caption shall include the name of the debtor and such other names used by it as are necessary to assure adequate identification.

Rule 10–107. Filing fees.

Every petition shall be accompanied by the prescribed filing fees.

Rule 10–108. List of creditors and stockholders; inventory.

(*a*) *Lists required.*—The trustee shall, or if the debtor is retained in possession it shall, at the expense of the

estate, file with the court, within such time as the court may fix, a list of the debtor's creditors of each class, showing the amounts and character of their claims and securities and, so far as known, the name and address or place of business of each creditor and whether the claim is disputed, contingent, or unliquidated as to amount, and a list of the debtor's stockholders of each class showing the number and kind of shares registered in the name of each stockholder, and the last known address or place of business of each stockholder. If the debtor is retained in possession, it shall file an inventory of its property showing the location, quantity, and money value thereof within the time fixed by the court.

(*b*) *List of security holders or information in possession of another person.*—If it appears that a person, other than the debtor or trustee, has in his possession or under his control a list of security holders of the debtor or information in respect to their names, addresses, or the securities held by any of them, and such list or information is necessary in order to disclose the names and addresses of the beneficial owners of such securities, or to prepare or complete the lists required by this rule, the court may direct such person, after a hearing on notice to him, to produce such list or a true copy thereof, or to permit the inspection or use thereof, or to furnish such information.

(*c*) *Impounding of lists.*—The court may, on cause shown, direct the impounding of the lists filed under this rule, in which event—

(1) the debtor, or the trustee, or any indenture trustee, creditor or stockholder shall be permitted their inspection or use on such terms as the court may prescribe; and

(2) the court may refuse to permit such inspection by any creditor or stockholder who acquired his claim or stock within 3 months preceding the filing of a Chapter X petition or during the pendency of the Chapter X case.

Rule 10–109. Verification of petitions, lists, and inventories.

All lists, inventories, and amendments thereto filed by a debtor in possession and all petitions and amendments thereto shall be verified.

Rule 10–110. Amendments of petitions, lists, and inventories.

(*a*) *Petitions.*—A voluntary or an involuntary petition may be amended as a matter of course at any time before a responsive pleading is served or the petition is approved pursuant to Rule 10–113. An amendment at any other time may be made only by leave of court. Subdivisions (b), (c), and (d) of Rule 15 of the Federal Rules of Civil Procedure apply to amendments of petitions.

(*b*) *Lists and inventories.*—An inventory of property filed pursuant to Rule 10–108 may be amended as a matter of course at any time before confirmation of a plan. A list of creditors or stockholders filed pursuant to Rule 10–108 may be amended as a matter of course at any time before expiration of the time fixed for filing claims pursuant to Rule 10–401 (b). Thereafter such a list may be amended only with leave of court on such notice as the court may direct. The court may, on application or motion of any party in interest, or on its own initiative, order any list or inventory to be amended.

(*c*) *Number of copies; notice.*—Every amendment under this rule shall be filed in the same number as required of the original paper, and the court shall give notice of the amendment to such persons as it may designate.

Rule 10–111. Service of petition and process.

On the filing of an involuntary petition, the clerk of the district court, or, if filed in a pending bankruptcy case, the bankruptcy judge shall forthwith issue a summons for service on the debtor. The summons shall conform substantially to Official Form No. 10–3, and a

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copy shall be served with a copy of the petition in the manner provided for service of a summons, complaint, and notice of trial by Bankruptcy Rule 704 (b), (c), or (i). The summons and petition may be served anywhere. The provisions of Bankruptcy Rule 704 (e), (g), and (h) apply when service is made or attempted under this rule.

Rule 10–112. Responsive pleading.

(*a*) *Time for filing answer.*

(*1*) *By debtor.*—The debtor may serve and file an answer to an involuntary petition within 20 days after the issuance of the summons.

(*2*) *By other parties.*—Any creditor, indenture trustee, or stockholder may serve and file an answer to a voluntary or involuntary petition not later than 15 days before the first date set for the first meeting of creditors and stockholders provided for in Rule 10–212. A timely answer filed under this paragraph shall be deemed also to constitute a motion to vacate any prior order of approval of a petition.

(*b*) *Contents of answer.*—The answer to a petition shall contain all defenses and objections, including those which may be raised by separate motion under Rule 12 (b), (e), or (f) of the Federal Rules of Civil Procedure. Such answer may include the statement of a claim against a petitioning creditor only for the purpose of defeating the petition.

(*c*) *Other responsive pleadings.*—No other responsive pleadings shall be allowed, except that the court may order a reply to an answer and prescribe the time for it to be served and filed.

Rule 10–113. Disposition of petition; preliminary approval; hearing.

(*a*) *Voluntary petition.*—On the filing of a voluntary petition, the court shall enter an order approving the petition if satisfied that it complies with the requirements of Chapter X of the Act and has been filed in good faith.

If not so satisfied, the court shall enter an order permitting the petition to be amended or dismissing the case.

(*b*) *Involuntary petition.*—If an answer to an involuntary petition is not filed by a debtor within the time provided by Rule 10–112 (a)(1), and if no other party in interest has filed an answer within such time, or if any answer filed does not set forth any valid defense or objection to such petition, the court shall enter an order approving the petition if satisfied that it complies with the requirements of Chapter X of the Act and has been filed in good faith. If not so satisfied, the court shall enter an order permitting the petition to be amended or dismissing the case.

(*c*) *Hearing.*—(1) If no timely answer is filed the court may nevertheless hold a hearing on such notice as it may direct before approving or dismissing a petition pursuant to subdivision (a) or (b) of this rule.

(2) If a timely answer is filed, the court shall hold a hearing at the earliest practicable time on such notice as it may direct, and shall determine the issues and approve the petition, dismiss the case, or enter such other order as may be appropriate.

(*d*) *Award of costs.*—When a case commenced by the filing of an involuntary petition is dismissed pursuant to this rule, the court on reasonable notice to the petitioner or petitioners may award to the prevailing party the same costs that are allowed to a prevailing party in a civil action and reasonable counsel fees, and shall award any other sums required by the Act.

Rule 10–114. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *Debtor.*—A petition filed pursuant to Rule 10–104 or 10–105 may be filed in the district (A) where the debtor has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the debtor has

property. If a bankruptcy case is pending by or against the debtor, the petition shall be filed with the court in which that case is pending.

(2) *Affiliate.*—Notwithstanding the foregoing, a petition commencing a Chapter X case may be filed by or against an affiliate of a debtor or bankrupt in a district where a petition under the Act by or against the debtor or bankrupt is pending.

(b) *Transfer of cases; dismissal or retention when venue improper.*

(1) *When venue proper.*—Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors and stockholders held pursuant to Rule 10–212 either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(2) *When venue improper.*—If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors and stockholders held pursuant to Rule 10–212 either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

(c) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—If petitions commencing Chapter X cases or a Chapter X case and any other case under the Act are filed in different districts by or against (1) the same debtor, or (2) a

debtor and an affiliate, the court in which the first petition is filed shall, after hearing on motion and notice to the petitioners and such other persons as the court may designate, determine the court or courts in which the case or cases should proceed in the interest of justice and for the convenience of the parties. The proceedings on the other petitions shall be stayed by the courts in which such petitions have been filed until such determination is made. Thereafter all the courts in which petitions have been filed shall proceed in accordance with the determination.

(*d*) *Reference of transferred cases.*—A case transferred under this rule shall, in accordance with Rule 10–103, be referred by the clerk of the district court to which it has been transferred.

Rule 10–115. Joint administration of cases pending in same court.

(*a*) *Cases involving 2 or more related debtors.*—If 2 or more petitions are pending in the same court by or against a debtor and an affiliate, the court may order a joint administration of the estates. Before making such an order, the court shall give due consideration to the protection of creditors and stockholders of the different estates against potential conflicts of interest.

(*b*) *Expediting and protective orders.*—When an order for joint administration of 2 or more cases is entered pursuant to this rule, the court, while protecting the rights of the parties under the Act, may make such orders as may tend to avoid unnecessary costs and delay.

Rule 10–116. Debtor involved in foreign proceeding.

Bankruptcy Rule 119 applies in Chapter X cases.

Rule 10–117. Conversion to Chapter XI.

Whenever, after hearing on such notice as the court may direct, the court finds that adequate relief can be obtained under Chapter XI of the Act, the court may dismiss the Chapter X case or, with the consent of the debtor, direct that the case proceed under Chapter XI.

Rule 10–118. Applicability of rules in Part VII of the Bankruptcy Rules.

Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules in Part VII of the Bankruptcy Rules apply in all proceedings relating to a contested petition: Rules: 705, 708–710, 716, 724–726, 728–737, 744.1, 752, 756, and 762. The court may direct that one or more of the other rules in Part VII shall also apply in such a proceeding. For the purposes of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition, and a reference in the Federal Rules of Civil Procedure to the complaint shall be read as a reference to the petition.

PART II. OFFICERS FOR ADMINISTERING THE ESTATE; NOTICES; MEETINGS; EXAMINATIONS; COMMITTEES; ATTORNEYS AND ACCOUNTANTS

Rule 10–201. Appointment and duties of receivers.

(*a*) *When receiver may be appointed.*—The court may appoint a receiver only before approval of a petition and, subject to the provisions of this rule, when necessary in the best interest of the estate (1) to take charge of the property of a debtor; (2) to conduct the business of the debtor; or (3) to afford representation to the estate in an action, adversary proceeding, or contested matter.

(*b*) *Application for appointment.*—An application for appointment of a receiver shall state the specific facts showing the necessity for the appointment.

(*c*) *Appointment.*

(1) When an involuntary petition is filed, appointment of a receiver may be made only on application. The application may be granted only after hearing on notice to the debtor and such other parties in interest as the court may designate, except that a receiver may be appointed without notice if irreparable loss to the estate may otherwise result. An application for appointment

of a receiver without notice and any order of appointment made without notice shall state what loss may result and why it would be irreparable.

(2) When a voluntary petition is filed, the court may appoint a receiver on application or on its own initiative. Such appointment shall be made only after notice to such persons as the court may designate, unless it clearly appears that notice is impracticable or unnecessary.

(*d*) *Bond of applicant.*—No receiver may be appointed under subdivision (c)(1) of this rule unless the applicant furnishes a bond in such amount and with such surety as the court shall approve, conditioned to indemnify the debtor for the costs, counsel fees, expenses, and damages occasioned by the appointment and action of the receiver in the event the petition is dismissed. The property of the debtor shall be released, however, if it files a counterbond in such amount and with such surety as the court shall approve, conditioned that the debtor account for and turn over such property or pay to the trustee or estate the value thereof in money at the time of release, in the event the petition is approved.

(*e*) *Eligibility.*—Only a person eligible to be a trustee under Bankruptcy Rule 209 (d) may be appointed a receiver.

(*f*) *Order of appointment.*—An order appointing a receiver shall state why the appointment is necessary and shall specify his duties. A copy of every order appointing a receiver shall forthwith be delivered to the debtor, or mailed to it at its last known address, and to such other persons as the court may designate.

(*g*) *Notice of appointment; qualification.*—The court shall immediately notify the receiver of his appointment, inform him of how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office. A receiver shall qualify as provided in Rule 10–204.

(*h*) *Termination of appointment.*—The appointment

of a receiver shall be terminated when the trustee qualifies, the debtor is continued in possession, or there is no further need for a receiver. On termination of his appointment and unless otherwise ordered, the receiver shall forthwith turn over to the trustee or debtor in possession all the records and property of the estate in his possession or subject to his control as receiver and file his final report and account within 30 days.

(*i*) *Removal.*—The court may at any time, without or on cause shown, remove a receiver.

Rule 10–202. Appointment of trustee.

(*a*) *Appointment.*—On approval of a petition, the court shall, if the indebtedness of a debtor, liquidated as to amount and not contingent as to liability, is $250,000 or over, promptly and on its own initiative, appoint one or more trustees; if such indebtedness is less than $250,000, the court may appoint one or more trustees or continue the debtor in possession.

(*b*) *Notice of appointment; qualification.*—The court shall immediately notify the trustee of his appointment, inform him of how he may qualify, and shall require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall qualify as provided in Rule 10–204.

(*c*) *Eligibility.*—(1) A trustee shall be disinterested and shall be competent to perform the duties of his office. If a corporation, it shall be authorized by its charter to act as trustee.

(2) A person shall not be deemed disinterested if (A) he is a creditor or stockholder of the debtor; (B) he is or was an underwriter of any of the outstanding securities of the debtor or within 5 years prior to the date of the filing of the petition was the underwriter of any securities of the debtor; (C) he is, or was within 2 years prior to the date of the filing of the petition, a director, officer, or employee of the debtor or any such underwriter, or an attorney for the debtor or such underwriter; or

(D) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders. Representation of a creditor or stockholder of the debtor in a matter other than one which may become involved in the Chapter X case need not be deemed of itself to affect the disinterestedness of an attorney.

(*d*) *Appointment of co-trustees or substitute trustees; removal; hearing.*—(1) The court may, at any time, appoint co-trustees, remove trustees and appoint substitute trustees, or terminate the debtor's possession and appoint a trustee or trustees.

(2) When the indebtedness of a debtor as specified in subdivision (a) of this rule is less than $250,000, the court may, at any time, terminate the appointment of a trustee or trustees and restore the debtor to possession.

(3) Within 90 days after each appointment or restoration of the debtor to possession under paragraph (1) or (2) of this subdivision, the court shall hold a hearing on at least 10 days' notice to the persons entitled to receive notices under Rule 10–209 to consider objections to the retention in office of the trustee or continuance of the debtor in possession.

(*e*) *Majority vote.*—Whenever there are 2 or more trustees, they may act by majority vote.

Rule 10–203. Trustees for estates when joint administration ordered.

(*a*) *Appointment of trustees for estates being jointly administered.*—If the court orders a joint administration of 2 or more estates pursuant to Rule 10–115 (a), it may appoint one or more common trustees or separate trustees for the estates being jointly administered. Common trustees shall not be appointed unless the court is satisfied that parties in interest in the different estates will not be prejudiced by conflicts of interest of such trustees.

(*b*) *Separate accounts.*—The trustee or trustees of estates being jointly administered shall nevertheless keep separate accounts of the property of each estate.

Rule 10–204. Qualification by trustee and receiver.

(*a*) *Qualifying bond or security.*—Except as provided hereinafter, every trustee and every receiver shall, before entering on the performance of his official duties and within 5 days after his appointment, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Amount of bond and sufficiency of surety.*—The court shall determine the amount of the bond and the sufficiency of the surety for each bond filed under this rule.

(*c*) *Filing of bond; proceeding on bond.*—Unless otherwise provided by local rule, a bond given under this rule shall be filed with the court. A proceeding on the bond of a trustee or receiver may be brought by any party in interest in the name of the United States for the use of the person injured by the breach of the condition. No proceeding shall be brought on a trustee's or receiver's bond more than 2 years after his discharge.

(*d*) *Evidence of qualification; debtor continued in possession.*—A certified copy of the order approving the bond or other security given by a trustee or receiver under subdivision (a) of this rule shall constitute conclusive evidence of his appointment and qualification. Whenever evidence is required that a debtor is a debtor in possession, the court may so certify and the certificate shall constitute conclusive evidence of that fact.

Rule 10–205. Substitution of successor trustee or receiver.

When a trustee or receiver dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter X case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

Rule 10–206. Employment of attorneys and accountants.

(*a*) *Conditions of employment of attorneys and accountants.*—Bankruptcy Rule 215 applies to the employment, in Chapter X cases, of attorneys and accountants by a trustee, receiver, or debtor in possession. In addition, an attorney appointed to represent a trustee shall be disinterested as specified in Rule 10–202 (c)(2). Notwithstanding the foregoing, the court may, when it is in the best interest of the estate, authorize the employment for special purposes to be set out in the order, other than to represent the trustee in conducting the case, of an attorney who is not disinterested provided that such attorney represents or holds no interest adverse to the estate in the matters upon which he is to be engaged.

(*b*) *Employment of attorney not disinterested.*—Any attorney who was not disinterested as required by subdivision (a) of this rule and who failed to disclose any material fact on the question of his disinterestedness may be denied the allowance of compensation or reimbursement of expenses, or both, and any allowance to the trustee may also be denied if it shall appear that he failed to make diligent inquiry into the connections of such attorney.

Rule 10–207. Authorization of trustee, receiver, or debtor in possession to conduct business of debtor.

The court may authorize the trustee, receiver, or debtor in possession to conduct the business and manage the property of the debtor for such time and on such conditions as may be in the best interest of the estate.

Rule 10–208. Duty of trustee and debtor in possession to investigate, make reports, furnish information, and prepare plans; examiners.

(*a*) *Trustee.*—A trustee shall (1) file the lists as required by Rule 10–108; (2) unless otherwise ordered, make a report at the meeting provided for in Rule 10–212 which shall include a summary of his operations of the

business and management of the property; (3) file with the court within the times fixed by the court, periodic reports and summaries of the operations of the business and such other information as may be required by the court; (4) investigate the acts, conduct, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the case or to the formulation of a plan; (5) file a report with the court concerning any facts ascertained by him pertaining to fraud, misconduct, mismanagement, and irregularities, and to any causes of action available to the estate; (6) if the court so authorizes, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters; (7) as soon as practicable, file a statement of his investigations, and cause copies or a summary thereof to be mailed to the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the court may designate; (8) notify creditors and stockholders that they may submit to him plans or suggestions for the formulation of a plan, within a time fixed by him in such notice; (9) file a plan or report as required by Rule 10–301 (c)(1); (10) within 30 days after the date of the order confirming the plan or within such other time as the court may fix, file a report with the court concerning the action taken by him and the progress made in the consummation of the plan and file such further reports as the court may direct until the plan has been consummated; and (11) after consummation of a plan, file an application for a final decree showing that the plan has been consummated, and the names and addresses, if known, of the holders of claims or interests which have not been surrendered or released in accordance with the provisions of the plan and the nature and amounts of such claims or interests, and such other facts as may be necessary to enable the court to pass upon the provisions to be included in the final decree.

(*b*) *Debtor in possession; examiner.*—If a debtor is continued in possession it shall perform the duties specified in subdivision (a)(9) and such other duties specified in subdivision (a) of this rule as directed by the court or the court may appoint a disinterested person as specified in Rule 10–202 (c) as examiner to perform all or any of such duties.

(*c*) *Transmission of reports; form.*—The court shall direct copies or summaries of annual reports, and may direct copies or summaries of other reports, to be mailed to the creditors, stockholders, and indenture trustees, and may also direct the publication of summaries of any such reports. The Securities and Exchange Commission may recommend the form of such reports and summaries.

Rule 10–209. Notices to creditors, stockholders, and United States.

(*a*) *Notice of first meeting of creditors and stockholders.*—The trustee, receiver, or debtor in possession shall give all creditors, stockholders, indenture trustees, and such other persons as the court may designate, at least 30 days' notice by mail of the meeting held pursuant to Rule 10–212. Such notice shall conform substantially to Official Form No. 10–5.

(*b*) *Twenty-day notice to all creditors and parties in interest.*—Except as provided in subdivision (f) of this rule, the trustee or debtor in possession shall give all creditors, stockholders, and indenture trustees, at least 20 days' notice by mail of (1) the hearing on the retention in office of a trustee or trustees appointed at the meeting held pursuant to Rule 10–212; (2) the hearing on approval of a compromise or settlement of a controversy, unless the court for cause shown directs that notice not be sent; (3) the hearing on the dismissal or conversion to bankruptcy of a case when notice is required by Rule 10–308; (4) any proposed sale of property, other than in the ordinary course of business, including the time and place of any public sale, unless the court for

cause shown shortens the time or orders a sale without notice; (5) the time fixed for filing objections to confirmation of a plan; (6) the hearing on applications for allowances of compensation and reimbursement of expenses; and (7) the time fixed for submitting plans or suggestions for the formulation of a plan to the trustee. The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(*c*) *Other notices to all creditors and parties in interest.*—Except as provided in subdivision (f) of this rule, the trustee, receiver, or debtor in possession shall give notice by mail to the debtor, all creditors, stockholders, and indenture trustees of (1) dismissal of the case pursuant to Rule 10–308; (2) except as to stockholders, the time fixed for filing proofs of claim pursuant to Rule 10–401 (b)(1); (3) the hearing on approval of a plan pursuant to Rule 10–303 (a); (4) the time fixed for accepting a plan pursuant to Rule 10–303 (d); (5) the time fixed to reject a modification of a plan pursuant to Rule 10–306 (b); (6) the hearing on approval of a modification of a plan pursuant to Rule 10–306 (b); (7) the hearing on confirmation of a plan pursuant to Rule 10–307 (a)(2); and (8) confirmation of a plan pursuant to Rule 10–307 (a)(2).

(*d*) *Addresses of notices.*—All notices to which a creditor, stockholder, or indenture trustee is entitled under these rules shall be addressed to such person as he or his authorized agent may direct in a request filed with the court; otherwise, to his address shown in the lists or, if a different address is stated in a proof of claim duly filed, then at the address so stated.

(*e*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under these rules shall be mailed (1) to the Securities and Exchange Com-

mission at Washington, District of Columbia, and at such other place as it shall designate in writing filed with the court; (2) to the district director of internal revenue for the district in which the case is pending; (3) to the Secretary of the Treasury if the filed papers disclose a stock interest of the United States; and (4) whenever the lists or any other paper filed in the case discloses a debt to the United States other than one for taxes, to the United States attorney for the district in which the case is pending and, if disclosed by the filed papers, to the department, agency, or instrumentality of the United States through which the debtor became so indebted.

(*f*) *Notice by publication.*—If the court finds that notice to creditors and stockholders by mail as provided in this rule cannot be given or that it is desirable to supplement such notice, the court may order publication thereof.

(*g*) *Orders designating matter of notices.*—Except as otherwise provided by these rules, the court may from time to time enter orders designating the matters in respect to which, the persons to whom, and the form and manner in which notices shall be sent.

(*h*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 10–106.

Rule 10–210. Standing to be heard; intervention.

(*a*) *Standing to be heard.*

(1) The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a Chapter X case.

(2) A labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees.

(*b*) *Intervention.*—The court may for cause shown permit any interested person to intervene generally or with respect to any specified matter in the Chapter X case.

(*c*) *Securities and Exchange Commission.*—The Securities and Exchange Commission may, or if requested by the court shall, intervene in a Chapter X case. On the filing of a notice of intervention, the Commission shall be deemed a party in interest with the right to be heard on all matters in the case except that it may not appeal to the court of appeals from any order of the district court.

(*d*) *Notices to the Securities and Exchange Commission.*—In addition to the notices and papers required by these rules, the court shall transmit to the Securities and Exchange Commission at Washington, District of Columbia, and at such other place as it shall designate in writing filed with the court (1) notice of all other steps taken in connection with the case, (2) answers, if any, to a petition commencing a Chapter X case, (3) orders approving or dismissing petitions, (4) orders determining the division of creditors and stockholders into classes, (5) orders approving a plan or plans or modifications of plans, (6) orders confirming plans together with copies of such plans, (7) orders making or refusing allowances for compensation and expenses, (8) the order determining the debtor to be solvent or insolvent, (9) orders directing that the case be converted to bankruptcy or dismissing the case, and (10) such other papers filed in the case as the Securities and Exchange Commission may request or which the court may direct be transmitted to it. Copies of opinions or reports, if any, with respect to the matters enumerated above shall also be transmitted to the Securities and Exchange Commission.

Rule 10–211. Representation of creditors and stockholders.

(*a*) *Data required.*—Every person or committee representing more than one creditor or stockholder, and every indenture trustee, shall file a signed statement with the court setting forth (1) the names and addresses of such creditors or stockholders; (2) the nature and amounts

of their claims or stock and the time of acquisition thereof unless they are alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a committee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the case of any indenture trustee, a showing of the amounts of claims or stock owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors or stockholders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(*b*) *Failure to comply; effect.*—The court on its own initiative or on application or motion of any party in interest (1) may determine whether there has been a failure to comply with the provisions of this rule or with any other applicable law regulating the activities and personnel of any person, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit any such person, committee, or indenture trustee to be heard further or to intervene in the case; (2) may examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or stock acquired by any person or committee in contemplation or in the course of a case under the Act and grant

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appropriate relief pursuant to the Act; and (3) may hold invalid any authority or acceptance given, procured, or received by a person or committee who has not complied with subdivision (a) of this rule or with Rule 10–304.

Rule 10–212. Meeting of creditors and stockholders.

(*a*) *Date and place.*—A meeting of creditors and stockholders shall be held not less than 30 nor more than 90 days after the approval of a petition commencing a Chapter X case. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*b*) *Agenda.*—At the meeting of creditors and stockholders, the bankruptcy judge shall (1) preside over the transaction of such business as is proper under Chapter X of the Act, including the examination of the debtor, (2) hear objections to the retention of the trustee or trustees or continuing the debtor in possession, (3) appoint a trustee or trustees if none has previously been appointed and the debtor is not continued in possession and fix a date for the hearing of objections to the retention of such trustee or trustees, and (4) receive the trustee's report, if any.

Rule 10–213. Examination.

(*a*) *Examination on application.*—On application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless local rules otherwise provide.

(*b*) *Examination by trustee, examiner, or other persons.*—The trustee or examiner shall, if the court so directs, and any other person may, with the permission of court, examine the directors and officers of the debtor and any other witnesses.

(*c*) *Scope of examination.*—The examination under this rule or Rule 10–212 (b) may relate to acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the

continuance thereof, and any other matter relevant to the case or to the formulation of a plan.

(*d*) *Compelling attendance for examination and production of documentary evidence.*—The attendance of any person for examination and the production of documentary evidence may be compelled in accordance with the provisions of Bankruptcy Rule 916 by the use of a subpoena for a hearing or trial.

(*e*) *Place of examination of debtor.*—Without issuing a subpoena, the court may for cause shown and on such terms as it may impose order an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor to be examined under this rule at any place it designates, whether within or without the district wherein the case is pending.

(*f*) *Mileage.*—A person other than an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor shall not be required to attend as a witness before a bankruptcy judge unless his lawful mileage and fee for one day's attendance shall be first tendered to him. If an officer, a member of the board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor resides over 100 miles from the place of examination when he is required to appear for an examination under this rule, he shall be tendered mileage allowed by law to a witness for any distance over 100 miles from his residence at the date of the filing of the first petition commencing a case under the Act or his residence at the time he is required to appear for such examination, whichever is the lesser.

Rule 10–214. Apprehension and removal of debtor to compel attendance for examination.

Bankruptcy Rule 206 applies in Chapter X cases to an officer, a member of the board of directors or trustees or

of a similar controlling body, a controlling stockholder or member, or any other person in control of the debtor.

Rule 10–215. Compensation for services and reimbursement of expenses.

(*a*) *Application for compensation and reimbursement.*—A person seeking compensation from the estate for services or reimbursement of necessary expenses shall file with the court an application setting forth a detailed statement of (1) the services rendered and expenses incurred; (2) the amounts requested; and (3) the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the filing of a petition commencing a case under the Act. An application for compensation shall include a statement by the applicant as to what payments have theretofore been made or promised to him for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation he has previously received has been shared and whether an agreement or understanding exists between the applicant and any other person for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any such sharing of compensation or agreement or understanding therefor, except that the details of any agreement by the applicant for the sharing of his compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other person.

(*b*) *Disclosure of compensation paid or promised to attorney for debtor.*—Every attorney for a debtor, whether or not he applies for compensation, shall file

with the court on or before the first date set for the meeting held pursuant to Rule 10–212, or at such other time as the court may direct, a statement setting forth the compensation paid or promised him for the services rendered or to be rendered in connection with the case, the source of the compensation so paid or promised, and whether the attorney has shared or agreed to share such compensation with any other person. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of his compensation with a member or regular associate of his law firm shall not be required.

(*c*) *Factors in allowing compensation and reimbursement of expenses.*

(*1*) *General.*—(A) Reasonable compensation for necessary services and reimbursement of necessary expenses incurred in a Chapter X case may be allowed by the court to the trustee, receiver, examiner, and their attorneys, the attorney for the debtor in possession, the attorney for the debtor, and such other persons as may be authorized to assist the trustee, receiver, examiner, or debtor in possession. (B) Reasonable compensation and reimbursement of expenses may be allowed by the court to creditors and stockholders, committees or representatives of creditors or stockholders, indenture trustees, depositaries, reorganization managers, and any other parties in interest, and the attorneys or agents for any of them, except the Securities and Exchange Commission, for services which are beneficial in the administration of the estate, for services which contribute to a plan which is approved or to the approval of a plan whether or not such plan is confirmed, for services which contribute to a plan which is confirmed or to the confirmation of a plan, and for services rendered in opposing a plan confirmation of which has been refused. (C) Reimbursement of expenses, including reasonable attorney's fees,

incurred by the petitioning creditors may be allowed by the court.

(2) *Superseded case.*—If the Chapter X petition was filed in a pending bankruptcy case or the Chapter X case was originally commenced under Chapter XI, the court may allow, if not already allowed, reasonable compensation for services rendered and reimbursement of expenses to a marshal, receiver, or trustee as allowed by the Act, to the attorney for petitioning creditors, to the attorney for the bankrupt or debtor, to the attorney for the debtor in possession, and to any other persons and their attorneys entitled to compensation under the Act or Rules in such bankruptcy or Chapter XI case.

(3) *Attorney or accountant.*—Compensation may be allowed an attorney or an accountant only for professional services.

(4) *Denial of allowances.*—No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the case in a representative or fiduciary capacity who, at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against, or stock of, the debtor, or beneficial interests direct or indirect in such claims or stock, or by whom or for whose account such claims, stock, or beneficial interests therein, have been otherwise acquired or transferred.

(5) *Dismissal or conversion to bankruptcy.*—On the dismissal or conversion of a case to bankruptcy pursuant to Rule 10–308, the court may allow reasonable compensation for services rendered and reimbursement of expenses incurred in the Chapter X case by any persons entitled thereto under this rule.

(d) *Restriction on sharing of compensation.*—Except as herein provided, a person rendering services in a Chapter X case or in connection with such a case shall not in any form or guise share or agree to share the compensation paid or allowed him from the estate for such serv-

ices with any other person, nor shall he share or agree to share in the compensation of any other person rendering services in a case under the Act or in connection with such a case. This rule does not prohibit an attorney or accountant from sharing his compensation as a trustee, receiver, attorney, or accountant with a member or regular associate of his firm, or from sharing in the compensation received by his firm or by any other member or regular associate thereof, and does not prohibit an attorney, other than one employed pursuant to Rule 10–206, from sharing his compensation for services rendered with any other attorney contributing thereto. If a person violates this subdivision, the court may deny him compensation, may hold invalid any transaction subject to examination under Rule 10–217 to which he is a party, or may enter such other order as may be appropriate.

Rule 10–216. Hearing on applications for compensation and reimbursement.

The court shall fix a time of hearing applications for allowances for services rendered or reimbursement of expenses in the Chapter X case or any other case or proceeding superseded thereby. Notice of such hearing shall be given to the applicants, the trustee, the debtor, the creditors, stockholders, indenture trustees, the Securities and Exchange Commission, and such other persons as the court may direct as provided in Rule 10–209 (b). Such notice need not be given to any class of creditors or stockholders which has no interest in the reorganized debtor under a plan for which the order of confirmation has become final.

Rule 10–217. Examination of debtor's transactions with its attorney.

(*a*) *Payment or transfer to attorney in contemplation of the filing of a petition under the Act.*—On motion by any party in interest or on the court's own initiative, the court may examine any payment of money or any trans-

fer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Act by or against it, to an attorney for services rendered or to be rendered.

(*b*) *Invalidation of unreasonable payment or transfer.*—Any payment or transfer examined under this rule shall be held valid only to the extent of a reasonable amount as determined by the court. The court may enter an order in favor of the estate in the amount of any excess found to have been paid or transferred.

PART III. PROCEEDINGS RELATING TO PLAN; DISMISSAL AND CONVERSION TO BANKRUPTCY; CONSUMMATION OF PLAN

Rule 10–301. Formulation and filing of plan.

(*a*) *Suggestions for plan.*—Within the time fixed by the trustee pursuant to Rule 10–208 (a), the debtor, creditors, and stockholders may submit to the trustee plans or suggestions for the formulation of a plan.

(*b*) *Time for filing plan or report.*—The court shall fix a time for the trustee, debtor in possession, or examiner to file a plan or report of the reasons why a plan cannot be formulated.

(*c*) *Filing of plan.*

(*1*) *When trustee appointed.*—Within the time fixed by the court under subdivision (b) of this rule, the trustee shall file a plan or a report of his reasons why a plan cannot be formulated. After the expiration of the time so fixed and before the conclusion of the hearing held pursuant to Rule 10–303, the debtor, any creditor, stockholder, or indenture trustee may file a plan.

(*2*) *When debtor retained in possession.*—Within the time fixed by the court under subdivision (b) of this rule, the debtor in possession or the examiner, if one is appointed pursuant to Rule 10–208 (b) and he is so directed by the court, shall file a plan or a report of the reasons why a plan cannot be formulated. A plan may

also be filed by any creditor, stockholder, or indenture trustee at any time before the conclusion of the hearing held pursuant to Rule 10–303.

(*d*) *Form of plan.*—Every proposed plan and any modification thereof shall be dated and identified with the name of the person or persons submitting or filing it.

Rule 10–302. Classification of claims; valuation of security.

(*a*) *Classification of claims.*—For the purposes of the plan and its acceptance, the court may fix, after hearing on such notice as it may direct, the division of creditors and stockholders into classes according to the nature of their respective claims and stock.

(*b*) *Valuation of security.*—For the purposes of classification under subdivision (a) of this rule, of claims which may be secured in whole or in part, the court shall, if necessary, on application of any party in interest, hold a hearing on such notice as the court may direct, to determine the value of the security interest and allow the claim as unsecured to the extent it is enforceable for any excess of the claim over such value.

Rule 10–303. Approval of plan by court.

(*a*) *Hearing on plan and objections thereto.*—After the filing of a plan or plans or a report of reasons why a plan cannot be formulated, as provided in Rule 10–301, the court shall hold a hearing on at least 20 days' notice to the debtor, creditors, stockholders and other parties in interest as provided in Rule 10–209, to consider such report or such plans, and any objections or modifications thereto, or substitute plans. When the court orders that a plan be submitted to the Securities and Exchange Commission for advisory report pursuant to subdivision (b) of this rule, it shall adjourn the hearing to a date subsequent to the time fixed for the filing of such report.

(*b*) *Submission of plan to Securities and Exchange Commission.*—If the indebtedness of the debtor is $3,-

000,000 or more, the court shall submit such plans as it deems worthy of consideration to the Securities and Exchange Commission for examination and advisory report and summary of such report. If the indebtedness is less than $3,000,000, the court may so submit any such plans. On submission of any plan to the Securities and Exchange Commission, the court shall fix a reasonable time within which the report of the Commission, if any, and summary thereof is to be filed with the court.

(*c*) *Approval of plan.*—The court shall rule on approval of the plan or plans at the hearing provided for under subdivision (a) of this rule or thereafter, unless there was a submission to the Securities and Exchange Commission pursuant to subdivision (b) of this rule. If there was such a submission, the court shall resume the hearing and rule on approval after the filing of the Commission's report, or notification to the court by the Commission that no report will be filed, or expiration of the time fixed for the filing of such report, whichever first occurs. If additional evidence is received, the court may resubmit the plan or plans to the Securities and Exchange Commission for supplemental report.

(*d*) *Dates fixed for acceptance and confirmation.*—On approval of the plan or plans, the court shall fix a time within which creditors and stockholders may accept or reject such plan or plans and may fix a date for the hearing on confirmation.

(*e*) *Transmission and notice to creditors and stockholders.*—On approval of a plan or plans, the trustee, debtor in possession, or examiner shall mail to all creditors and stockholders (1) the plan or plans and a summary thereof approved by the court unless the court directs that only such summary be mailed; (2) a summary of the opinion of the court, if any, approving the plan or plans which summary shall be approved by the court; (3) the summary of the report, prepared by the Securities and Exchange Commission, if any; (4) notice

of the date fixed, if any, for the hearing on confirmation; and (5) such other information as the court may direct. In addition, notice of the time within which acceptances and rejections of such plan or plans may be filed, and a form of ballot conforming substantially to Official Form No. 10–7 shall be mailed to creditors and stockholders entitled to vote on the plan or plans. The court may direct that the opinion of the court or report of the Securities and Exchange Commission be transmitted in place of, or in addition to, the summary thereof specified in clause (2) or (3) of this subdivision. In the event only summaries are transmitted, the plan, opinion of the court and report of the Securities and Exchange Commission shall be provided on request without charge. For the purposes of this subdivision, creditors and stockholders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the plan or plans is entered.

(*f*) *Limitation on solicitation before approval.*—No person shall solicit any acceptance of a plan or plans except as provided in Rule 10–304.

(*g*) *Public utility corporations.*

(1) If a debtor is a public utility corporation subject to the jurisdiction of a commission having regulatory jurisdiction over the debtor, a plan shall not be approved under subdivision (c) of this rule, until (A) it shall have been submitted to each such commission; (B) an opportunity shall have been afforded each such commission to suggest amendments or offer objections to the plan; and (C) the court shall have considered such amendments or objections at a hearing at which such commission may be heard.

(2) If a debtor is a public utility corporation, wholly intrastate, subject to the jurisdiction of a State commission having regulatory jurisdiction over such debtor, a plan shall not be approved, under subdivision (c) of this rule, unless such State commission shall have first certi-

fied its approval of such plan as to the public interest therein and the fairness thereof. On its failure to certify its approval or disapproval within 30 days, or such further time as the court may prescribe, after the submission of the plan to it, as provided in this subdivision, the public interest shall, for the purposes of such approval and of the confirmation of the plan, not be deemed to be affected by the plan.

(*h*) *Objections after approval.*—The order of the court approving a plan or plans pursuant to subdivision (c) of this rule shall not affect the right of any party in interest, including the Securities and Exchange Commission, to object to confirmation.

Rule 10–304. Solicitation of acceptances.

No person shall, without the consent of the court, solicit any acceptance or rejection, conditional or unconditional, of any plan, whether by proxy, deposit, power of attorney or otherwise, until after the entry of an order approving such plan pursuant to Rule 10–303 (c) and the transmittal thereof to creditors and stockholders pursuant to Rule 10–303 (e). Rule 10–211 (b) applies to any violation of this rule.

Rule 10–305. Acceptance or rejection of plans.

(*a*) *Persons entitled to accept or reject plan; time for acceptance or rejection.*—Any creditor whose claim is deemed allowed pursuant to Rule 10–401 (e) or has been allowed by the court and any creditor who is a security holder of record at the date the order approving a plan or plans is entered whose claim has not been disallowed and any stockholder of record at the date the order approving a plan or plans is entered whose stock interest has not been disallowed may accept or reject a plan or plans within the time fixed by the court pursuant to Rule 10–303 (d). For cause shown and within such time, the court may permit a creditor or stockholder to change or withdraw his acceptance or rejection. Notwithstand-

ing objection to a claim or stock interest, the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting or rejecting a plan.

(*b*) *Form of acceptance or rejection.*—An acceptance or rejection may be on Official Form No. 10–7, shall be in writing, shall identify the plan or plans accepted or rejected, and shall be signed by the creditor or stockholder or his authorized agent. If more than one plan is transmitted pursuant to Rule 10–303 (e), an acceptance or rejection may be filed by each creditor or stockholder for any number of such plans and if acceptances are filed for more than one plan, the creditor or stockholder may indicate his preferences among the plans so accepted.

(*c*) *Acceptance or rejection by partially secured creditors.*—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan or plans in both capacities.

(*d*) *Disqualification of acceptance or rejection.*—For the purpose of determining the requisite number of acceptances, the court after hearing on notice to the creditor or stockholder may disqualify any acceptance or rejection of a plan or modification of a plan if such acceptance or rejection was not in good faith in the light of or irrespective of the time of the acquisition of the claim or stock by such creditor or stockholder.

(*e*) *Computing requisite majorities.*—The requisite majorities necessary for the acceptance of a plan shall be computed on the basis of the claims and stock interests of creditors and stockholders affected by the plan who file an acceptance or rejection of the plan within the time prescribed, which in no event shall be less than the requisite majorities of the filed and allowed claims and stock interests. The filing of an acceptance or rejection of a plan by a creditor or stockholder shall be deemed to constitute the filing of a proof of claim or proof of stock

interest for the purpose of computing the majorities required by the Act.

Rule 10–306. Modification of plan before or after approval.

(*a*) *Modification prior to approval of plan.*—At any time prior to the approval of a plan, a party filing a plan pursuant to Rule 10–301 may file a modification thereof. At the hearing on approval or within such further time as the court may allow, any party in interest may file a modification of a plan or a substitute plan therefor.

(*b*) *Modification after approval of plan either before or after confirmation.*—After a plan has been approved, a party in interest may propose a modification of the plan only with leave of court for cause shown and subject to the provisions of subdivision (c)(1) of this rule. No acceptance of such a modification may be solicited before its approval without the consent of the court. If the court finds that the proposed modification does not materially and adversely affect the interest of any creditor or stockholder who has not in writing accepted it, the court may approve the modification and it shall be deemed accepted by all creditors and stockholders who have previously accepted the plan. If the court finds that the proposed modification does so affect the interest of any creditor or stockholder who has not in writing accepted it, the court shall (1) fix a date for a hearing to consider the approval of such modification, (2) enter an order that any creditor or stockholder who accepted the plan and who fails to file with the court, within such reasonable time as shall be fixed in the order, a written rejection of the modification, shall be deemed to have accepted the plan as modified, (3) order the mailing of notice of such order and the date fixed for the hearing on approval of the modification, accompanied by a copy or summary of the proposed modification, to creditors, stockholders, and other parties in interest at least 20

days before the date fixed for filing rejections of the modification, and (4) transmit, at least 20 days before the date fixed for such hearing, a copy of the proposed modification to the Securities and Exchange Commission with notice that the Commission may file a supplementary advisory report at or before the hearing on approval of the modification. The requirements of Rule 10–307 with respect to confirmation of a plan shall apply to such proposed modification except that the court may rule on confirmation at the hearing on approval and the notice transmitted under this subdivision shall so indicate.

(*c*) *Modification of plan after consummation.*

(1) After a plan has been substantially consummated, whether or not an order has been entered under this subdivision to that effect, the plan may not be modified if the proposed modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

(2) A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred: (A) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to its provisions; (B) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and (C) commencement of distribution to creditors and stockholders as provided in Rule 10–405 (a).

(3) On notice to the trustee, debtor, Securities and Exchange Commission, and such other persons as the court may direct, the trustee, debtor in possession, the corporation to which the assets of the debtor have been or are to be transferred under the plan, or any other party in interest may file an application with the court for an order declaring the plan to have been consummated or substantially consummated pursuant to this subdivision.

Rule 10–307. Confirmation of plan.

(*a*) *Objections to and hearing on confirmation.*

(*1*) *Objections.*—Objections to confirmation shall be filed at least 10 days before the hearing held under this subdivision, unless the court extends such time. A copy of any objection shall be mailed or delivered promptly to the trustee or debtor in possession, and to such other persons as may be designated by the court. An objection to confirmation is governed by Bankruptcy Rule 914.

(*2*) *Hearing.*—The court shall hold a hearing to rule on confirmation of a plan on at least 20 days' notice to the debtor, creditors, and stockholders, and other parties in interest as provided in Rule 10–209, whether or not any objections are timely filed. If more than one plan has received the requisite number of acceptances, the court shall consider the preferences indicated by the creditors and stockholders pursuant to Rule 10–305 (b) in determining which plan to confirm.

(*b*) *Order of confirmation.*—The order of confirmation shall conform substantially to Official Form No. 10–9 and notice of entry of the order of confirmation shall be mailed promptly to all parties in interest as provided in Rule 10–209.

Rule 10–308. Dismissal or conversion to bankruptcy or Chapter XI after approval of the petition.

(*a*) *Dismissal or conversion to bankruptcy or Chapter XI.*—The court shall enter an order, after hearing on notice as provided in Rule 10–209 (b), dismissing the case, or adjudicating the debtor a bankrupt if it has not been previously so adjudged, or directing that the bankruptcy case proceed, or, with the consent of the debtor, directing that the case proceed under Chapter XI of the Act, whichever may be in the best interest of the estate and appropriate under the Act—

(1) if no plan is proposed within the time fixed or extended by the court; or

(2) if no proposed plan is approved by the court and no further time is granted for the proposal of a plan; or

(3) if no approved plan is accepted within the time fixed or extended by the court; or

(4) if confirmation is refused and no further time is granted for the proposal of other plans; or

(5) if a confirmed plan is not consummated.

(*b*) *Notice of dismissal to creditors.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be given to creditors and stockholders in the manner provided in Rule 10–209 (c).

(*c*) *Revesting of title.*—A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to its property.

Rule 10–309. Consummation; final decree.

(*a*) *Orders in aid of consummation.*—The court may make such orders as may be necessary or useful in aid of consummation of a plan including fixing the time and manner for the deposit and distribution of the cash or other consideration under the plan, directing the debtor, trustee, mortgagees, indenture trustees, and other necessary parties to execute and deliver such instruments as may be necessary to effect a retention or transfer of property dealt with by the confirmed plan, and to perform other acts, including the satisfaction of liens.

(*b*) *Final decree.*—On consummation of the plan, the court shall enter a final decree which shall contain provisions (1) stating the effect of confirmation and consummation on the creditors and stockholders of the debtor; (2) discharging the trustee, if any; (3) making such provisions by way of injunction or otherwise as may be equitable; and (4) closing the estate.

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PART IV. CLAIMS AND DISTRIBUTION TO CREDITORS AND STOCKHOLDERS

Rule 10–401. Proof of claim or interest.

(*a*) *List of creditors and stockholders.*—The list of creditors and stockholders prepared and filed with the court pursuant to Rule 10–108 shall constitute prima facie evidence of the validity and amount of claims of creditors which are not listed as disputed, contingent, or unliquidated as to amount, and of stock interests and, except as provided in subdivision (b)(3) of this rule with respect to claims, it shall not be necessary for the holder of such claim or stock interest to file a proof of claim or interest.

(*b*) *Filing proof of claim.*

(*1*) *Time for filing.*—A proof of claim may be filed at any time prior to the approval of a plan except that the court may fix a different bar date for the filing of claims on notice as provided in Rule 10–209.

(*2*) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (b)(1) of this rule.

(*3*) *Who must file.*—(A) Any creditor, including the United States, a state, or any subdivision thereof, whose claim is listed as disputed, contingent, or unliquidated as to amount, shall file a proof of claim within the time prescribed by subdivision (b)(1) of this rule; any such creditor who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(B) Notwithstanding the foregoing, the court may, at any time, require the filing of a proof of claim within such time as it may fix. Any person required under this paragraph to file a proof of claim who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(*4*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima

facie evidence of the validity and amount of such claim. Such a proof of claim shall supersede any listing of that claim made pursuant to Rule 10–108.

(5) *Form and place of filing.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rule 10–402, shall be executed by the creditor or by his authorized agent. Subdivisions (b) and (c) of Bankruptcy Rule 302 apply in Chapter X cases except that subdivision (c) shall not apply to claims founded on bonds or debentures.

(6) *Filing by indenture trustee.*—An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee.

(c) *Transfer of claim.*—If a claim other than one founded on a bond or debenture has been assigned, a statement setting forth the terms of the assignment shall be filed with the court and a copy thereof delivered to the trustee or the debtor in possession.

(d) *Duty to examine and object to claims.*—The trustee or debtor in possession shall examine listed claims and proofs of claims and, unless no purpose would be served thereby, object to the allowance of improper claims.

(e) *Allowance when no objection made.*—Subject to the provisions of subdivision (b)(3) of this rule and Rule 10–302 (b), a claim filed or listed in accordance with this rule, or Rule 10–402 or listed in accordance with Rule 10–108, shall be deemed allowed unless objection is made by a party in interest.

(f) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and notice of a hearing thereon shall be mailed or delivered to the claimant, the debtor and the trustee, or debtor in possession. If an objection is joined with a demand for relief of the kind specified in

Rule 10–701, the proceeding thereby becomes an adversary proceeding.

(*g*) *Reconsideration of claims.*—Bankruptcy Rule 307 applies in Chapter X cases.

(*h*) *Proof of right to record status.*—For the purposes of Rules 10–305 and 10–405 and for the purpose of receiving notices, a person who is not the record holder of a security may show that he is nevertheless entitled to be treated as such holder of record by filing with the court proof thereof. An objection to such proof may be filed by any party in interest.

Rule 10–402. Claim by codebtor.

(*a*) *Filing of claim.*—If a creditor has not filed his proof of claim pursuant to Rule 10–401 (b), a person who is or may be liable with the debtor to that creditor, or who has secured that creditor, may, during the time for filing claims prescribed by Rule 10–401 (b), execute and file a proof of claim pursuant to this rule in the name of the creditor, if known or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 10–401 (b) and it shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(*b*) *Filing of acceptance; substitution of creditor.*—A person who has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known or if unknown, in his own name but if the creditor files a proof of claim within the time permitted by Rule 10–401 (b), or files a notice with the court of his intention to act in his own behalf prior to confirmation, he shall be substituted for such other person, with respect to that claim, for all purposes of the Chapter X case.

Rule 10–403. Post-petition tax claims.

Notwithstanding Rule 10–401 (b), the court may, at any time while a case is pending, permit the filing of a proof of claim for the following:

(1) Claims for taxes owing to the United States, a state, or any subdivision thereof, at the time of the filing of the petition under Rule 10–104 or 10–105 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of the petition.

(2) Claims for taxes owing to the United States, a state, or any subdivision thereof, after the filing of a petition under Rule 10–104 or 10–105 and which are assessed while the case is pending.

Rule 10–404. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a proof of claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on application or motion with notice to the trustee, receiver, or debtor in possession, and on order of the court containing such terms and conditions as the court deems proper.

Rule 10–405. Participation and distribution under plan.

(*a*) *Distribution.*—Subject to the provisions of subdivision (b) of this rule, after confirmation of a plan distribution shall be made, in accordance with the provisions of the plan, to holders of stock, bonds, debentures, notes, and other securities of record at the date the order confirming the plan becomes final whose claims or stock interests have not been disallowed and to other creditors whose claims have been allowed, and to indenture

trustees who have filed claims pursuant to Rule 10–401 (b)(6) and which are allowed.

(*b*) *Bar date for participation in distribution.*—When a plan requires presentment or surrender of securities or the performance of any other act as a condition to participation in distribution under the plan, the court shall, on the confirmation of the plan, enter an order on such notice to all affected persons as it may direct, fixing a time not less than 5 years after the final decree closing the estate within which such action shall be taken. Persons who have not within such time presented or surrendered their securities or who have not taken such other action required by the plan shall not participate in distribution thereunder.

Rule 10–406. Distributions; unclaimed money and securities.

(*a*) *Distributions.*—Except as otherwise provided in the plan and except with respect to an indenture trustee authorized by the indenture under which he is trustee to receive distributions, Bankruptcy Rule 308 applies in Chapter X cases to cash distributions made under a plan. Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor or stockholder entitled thereto and if a power of attorney authorizing another person to receive dividends has been executed and filed in acccordance with Bankruptcy Rule 910, such consideration shall be transmitted to such other person.

(*b*) *Unclaimed money and securities.*—Unless otherwise provided in the plan, the securities or cash remaining unclaimed at the expiration of the bar date fixed pursuant to Rule 10–405 (b), or any extension thereof, shall be delivered to the new corporation acquiring the assets of the debtor under the plan, if any, otherwise to the reorganized debtor.

PART V. COURTS OF BANKRUPTCY; OFFICERS AND PERSONNEL; THEIR DUTIES

Rule 10–501. Administrative matters.

Part V of the Bankruptcy Rules applies in Chapter X cases except that Rule 509 (a) thereof shall include the following additional sentence: "If a Chapter X case is not referred pursuant to Rule 10–103 (a), all papers shall be filed with the clerk of the district court or as directed by local rule or order of the district judge."

PART VI. PROPERTY OF THE ESTATE

Rule 10–601. Petition as automatic stay of actions against debtor and lien enforcement.

(*a*) *Stay of actions and lien enforcement.*—A petition filed under Rule 10–104 or 10–105 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate.

(*b*) *Duration of stay.*—Except as it may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the case is closed, dismissed or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Relief from stay.*—On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may,

for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*d*) *Ex parte relief from stay.*—On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of its estate, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under the subdivision shall give written or oral notice thereof as soon as possible to the debtor, the trustee, receiver, or debtor in possession or, if none has been designated or qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*e*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining or injunction order when otherwise authorized.

Rule 10–602. Duty of trustee, receiver, or debtor in possession to give notice of Chapter X case.

Bankruptcy Rule 602 applies in Chapter X cases.

Rule 10–603. Burden of proof as to validity of post-petition transfer.

Bankruptcy Rule 603 applies in Chapter X cases.

Rule 10–604. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any person required by the Act to deliver property in his possession or control to the trustee, receiver, or debtor in possession, shall promptly file a written report and account with the court in which the Chapter X case is pending with respect to the property of the estate and his administration thereof.

(*b*) *Examination of administration.*—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, the court shall determine the propriety of such administration, including the reasonableness of all disbursements.

Rule 10–605. Money of the estate: deposit and disbursement.

Bankruptcy Rule 605 (b) and (c) apply in Chapter X cases.

Rule 10–606. Rejection of executory contracts.

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other parties in interest as the court may direct.

Rule 10–607. Appraisal and sale of property; compensation and eligibility of appraisers and auctioneers.

(*a*) *Appraiser: appointment and duties.*—The court may appoint one or more competent and disinterested appraisers who shall prepare and file with the court an appraisal of the property of the debtor. The court may prescribe how such appraisal shall be made.

(*b*) *Sale of property.*—The court may, on such notice as it may direct and for cause shown, authorize the trustee, receiver, or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the court may approve.

(*c*) *Compensation and eligibility of auctioneers and appraisers.*—Bankruptcy Rule 606 (c) applies in Chapter X cases to any appraiser or auctioneer appointed by the court.

Rule 10–608. Abandonment of property.

After hearing on such notice as the court may direct and on approval by the court, the trustee, receiver, or debtor in possession may abandon any property.

Rule 10–609. Redemption of property from lien or sale.

Bankruptcy Rule 609 applies in Chapter X cases.

Rule 10–610. Prosecution and defense of proceedings by trustee, receiver, or debtor in possession.

Bankruptcy Rule 610 applies in Chapter X cases.

Rule 10–611. Preservation of voidable transfer.

Bankruptcy Rule 611 applies in Chapter X cases.

Rule 10–612. Proceeding to avoid indemnifying lien or transfer to surety.

Bankruptcy Rule 612 applies in Chapter X cases.

Part VII. Adversary Proceedings

Rule 10–701. Adversary proceedings.

Part VII of the Bankruptcy Rules governs any proceeding instituted by a party before a bankruptcy judge in a Chapter X case to (1) recover money or property other than a proceeding under Rule 10–217 or Rule 10–604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) obtain an injunction, or (5) obtain relief from a stay as provided

in Rule 10–601. Such a proceeding shall be known as an adversary proceeding.

PART VIII. APPEAL TO DISTRICT COURT

Rule 10–801. Appeal to district court.

Part VIII of the Bankruptcy Rules applies in Chapter X cases, except that:

(1) Rule 802 (c) thereof shall read as follows:

"(c) *Extension of time for appeal.*—The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property or the issuance of any certificate of indebtedness, or is not a judgment or order approving or dismissing a petition under Rule 10–113, or converting a Chapter X case to Chapter XI under Rule 10–117, or approving a plan under Rule 10–303, or confirming a plan under Rule 10–307, or dismissing a Chapter X case, or converting a Chapter X case to bankruptcy or to Chapter XI under Rule 10–308."

(2) The following shall be added to Rule 805 thereof:

"Unless an order approving a sale of property of issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

PART IX. GENERAL PROVISIONS

Rule 10–901. General provisions.

Part IX of the Bankruptcy Rules applies in Chapter X cases, except that:

(1) The definitions of words and phrases in § 106 of the Act govern their use in the Chapter X Rules to the extent they are not inconsistent therewith.

(2) "Bankruptcy judge" as defined in Rule 901 (7) shall also mean the district judge acting in a Chapter X case when there has been no reference under Rule 10–103.

(3) The references to various rules in Rule 906 (b) shall also include a reference to Chapter X Rule 10–212 (a).

(4) The references to various rules in Rule 906 (c) shall also include references to Chapter X Rules 10–209 (a) and 10–212 (a).

(5) The exception in Rule 910 (c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance or rejection of a plan."

(6) The reference in Rule 919 (a) shall be read as a reference to Chapter X Rule 10–209 (a).

(7) The reference in Rule 922 (b) to Rule 102 shall be read as a reference to Chapter X Rule 10–103.

OFFICIAL CHAPTER X FORMS

[NOTE. These official forms shall be observed and used, with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909.]

FORM No. 10–1

VOLUNTARY PETITION UNDER CHAPTER X

United States District Court
for the ..... District of.....

In re
.....,
Debtor
} Bankruptcy No. .....

VOLUNTARY PETITION UNDER CHAPTER X

1. Petitioner's post-office address is .....
.....

2. Petitioner is a corporation organized and existing under the laws of ..... and is qualified to file this petition and is entitled to the benefits of Chapter X of the Bankruptcy Act.

3. Petitioner has had its principal place of business [*or* has had its principal assets] within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

4. Petitioner is insolvent [*or* unable to pay its debts as they mature].

5. The nature of petitioner's business is .....
.....
.....

6. The indebtedness of petitioner, liquidated as to amount and not contingent as to liability, is $250,000 or over [*or* less than $250,000].

7. The assets, liabilities, and capital stock of petitioner are substantially as follows [attach most recent financial statements or set forth sufficient information about the business to enable the court to make findings with respect to its preliminary approval of the petition]:

(a) Assets. Description and location of the principal assets of petitioner: .....
.....
.....
.....

(b) Liabilities. The principal liabilities of petitioner consist of .....
.....
.....

(c) Capital Stock. The authorized, issued and outstanding capital stock of petitioner is as follows:

Authorized:
.....
.....
.....

Issued and outstanding:
.....
.....
.....

(d) Other facts, if any, affecting financial condition:
.....
.....
.....
.....

8. There are no proceedings pending affecting the property of petitioner, except as follows: .....
.....

9. No plan of reorganization, readjustment, or liquidation affecting the property of petitioner is pending, either in connection with or without any judicial proceeding, except as follows: .....
.....;
no other petition by or against petitioner is pending under Chapter X of the Act; nor is any other bankruptcy case, initiated by a pe-

tition by or against petitioner now pending [*or* Petitioner is a bankrupt in Bankruptcy Case No. ..... pending in this court].

10. The specific facts showing the need for relief under Chapter X of the Act are as follows: [state appropriate facts including why relief under Chapter XI would not be adequate] .....

.....

.....

.....

.....

.....

Wherefore petitioner prays for relief in accordance with Chapter X of the Act.

Signed: .....,
Attorney for Petitioner.

Address: .....,
.....

State of.....
County of..... } *ss.*

I, ..., the president [*or* other officer *or* an authorized agent] of the corporation named as petitioner in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief, and that the filing of this petition on behalf of the corporation has been authorized.

.....

Subscribed and sworn to before me on .....
.....,
.....
[*Official character*]

FORM No. 10–2

INVOLUNTARY PETITION UNDER CHAPTER X

[*Caption, other than designation, as in Form No. 10–1*]

INVOLUNTARY PETITION UNDER CHAPTER X

1. Petitioners, ..., of* ....., and ..... of* ....., and ..... of* ....., are creditors of ....., debtor, of* ....., having claims against debtor, liquidated as to amount and not contingent as to liability, amounting in the aggregate to $5,000 or over. The nature and amount of petitioners' claims are as follows: .....
.....

2. The debtor is a corporation organized and existing under the laws of ..... and is subject to an involuntary petition under Chapter X of the Bankruptcy Act.

3. The debtor has had its principal place of business [*or* has had its principal assets] within the district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

4. The debtor is insolvent [*or* unable to pay its debts as they mature].

5. The nature of the debtor's business is .....
.....
.....
.....

6. The indebtedness of the debtor liquidated as to amount and not contingent as to liability, is $250,000 or over [*or* less than $250,000].

7. The assets, liabilities, capital stock, and financial condition of debtor are substantially as follows [attach most recent financial statements or set forth sufficient information about the business to enable the court to make findings with respect to its preliminary approval of the petition]:

**State post-office address.*

(a) The assets of the debtor consist of [state description and location]:

..... $.....
....
....
....

Total ..... $.....

(b) The principal liabilities of the debtor consist of:

..... $.....
....
....
....

Total ..... $.....

(c) The issued and outstanding capital stock of the debtor are:

.....
.....
.....

(d) Other facts, if any, affecting the financial condition of the debtor: .....
.....
.....
.....

8. There are no pending proceedings affecting the property of the debtor, except as follows: .....
.....
.....

9. No plan of reorganization, readjustment, or liquidation affecting the property of the debtor is pending either in connection with or without any judicial proceeding, except as follows: .....
.....
.....;
no other petition by or against the debtor is pending under Chapter X of the Act; nor is any other bankruptcy case, initiated by a petition by or against the debtor now pending [*or* the debtor is a bankrupt, in Bankruptcy Case No. ..... pending in this court].

10. The specific facts showing the need for relief under Chapter X of the Act are as follows: [state appropriate facts including why relief under Chapter XI would not be adequate] .....
.....
.....

11. [A receiver [*or* trustee] has been appointed for *or* has taken charge of all or the greater portion of the property of the debtor in a pending equity proceeding as follows: .....
.....
.....] *or*

[An indenture trustee [*or* a mortgagee under a mortgage] is, by reason of a default, in possession of all or the greater portion of the property of the debtor, as follows: .....
.....
.....] *or*

[A proceeding to foreclose a mortgage *or* to enforce a lien against all or the greater portion of the property of the debtor is pending, as follows: .....
.....
.....] *or*

[Within the 4 months preceding the filing of this petition, the debtor committed an act of bankruptcy in that it did on .....
.....
.....].

Wherefore petitioners pray for relief in accordance with Chapter X of the Act.

Signed: .....,
Attorney for Petitioners.

Address: .....,
.....

State of.....
County of..... } *ss.*

I, ..., one of the petitioners named in the foregoing petition do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....
Petitioner.

Subscribed and sworn to before me on .....
.....,
.....
[*Official character*]

FORM No. 10–3

SUMMONS TO DEBTOR

[*Caption, other than designation, as in Form No. 10–1*]

SUMMONS

To the Above-named debtor:

An involuntary petition for your reorganization under Chapter X of the Bankruptcy Act having been filed on ..... in this court of bankruptcy,

You are hereby summoned and required to file with this court and to serve upon the petitioners' attorney, whose address is ...., an answer to the petition which is herewith served upon you, on or before .....

If you fail to do so, the petition may be approved by default.

....., *Bankruptcy Judge.*

[*If Appropriate*] ....., *Clerk of the District Court.*

[Seal of the United States District Court]

Date of Issuance: .....

FORM No. 10–4

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

[*Caption, other than designation, as in Form No. 10–1*]

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

I hereby certify that the above-named debtor continues in possession of its estate as debtor in possession, no trustee having been appointed.

Dated: .....

....., *Bankruptcy Judge.*

Form No. 10–5

Order for First Meeting of Creditors and Stockholders and Related Orders, Combined With Notice Thereof and of Automatic Stay

[*Caption, other than designation, as in Form No. 10–1*]

Order for First Meeting of Creditors and Stockholders and Hearing on Approval of the Petition, Retention of Trustee or Debtor in Possession, Combined With Notice Thereof and of Automatic Stay

To the debtor, its creditors, and stockholders, and other parties in interest:

A petition having been filed, on ..... by ....., the above-named debtor of* ....., [*or* against ....., of* .....,] seeking relief under Chapter X of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors and stockholders shall be held at ..... on ..... at ..... o'clock .... m.;

2. The last date for filing an answer to the petition by any creditor, indenture trustee, or stockholder is ..... If any such answer is timely filed, a hearing on the approval of the petition will be held at .... on ....., at ..... o'clock .... m. [*or* at the first meeting of creditors and stockholders].

3. The hearing on the retention of the trustee, ..., of* .... [*or* the debtor in possession] will be held at the first meeting of creditors and stockholders [*or* a trustee will be appointed at such meeting and a date will then be fixed for the hearing on his retention in office].

4. The trustee [*or* debtor in possession] has filed or will file a list of creditors and stockholders pursuant to Rule 10–108. Any creditor holding a listed claim which is not listed as disputed, contingent, or unliquidated as to amount, may, but need not, file a proof of claim in this case. Creditors whose claims are not listed

---

**State post-office address.*

or whose claims are listed as disputed, contingent, or unliquidated as to amount and who desire to participate in the case or share in any distribution must file their proofs of claim on or before .....
....., which date is hereby fixed as the last day for filing a proof of claim [*or, if appropriate,* on or before a date to be later fixed of which you will be notified]. Any creditor who desires to rely on the list has the responsibility for determining that he is accurately listed.

You are further notified that:

The first meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors and stockholders.

When required pursuant to Rule 10–303 notice of the time to file acceptances or rejections of a plan shall be transmitted to holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving a plan is entered.

At the first meeting, creditors and stockholders may examine the debtor as permitted by the court, and transact such other business as may properly come before such meeting.

The filing of the petition by [*or* against] the debtor above-named operates as a stay of the commencement or continuation of any action against the debtor, or the enforcement of any judgment against it, of any act or the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor and of any court proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of its estate as provided by Rule 10–601.

[*If appropriate*] .....
of* .....
has been appointed receiver of the estate of the above-named debtor.

Dated: .....

.....,
Bankruptcy Judge.

FORM NO. 10–6

ORDER APPROVING PLAN AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 10–1*]

ORDER APPROVING PLAN AND FIXING TIME FOR FILING ACCEPTANCES OR REJECTIONS, COMBINED WITH NOTICE THEREOF

A plan under Chapter X of the Bankruptcy Act having been filed by ..... on

**State post-office address.*

.....[*if appropriate,* and by .....], on .....] [*if appropriate,* as modified by a modification filed on .....]; and

It having been determined after hearing on notice that:

1. The provisions of Article X of Chapter X of the Act have been complied with; and

2. The plan is [*or* plans are] fair and equitable, and feasible; and

3. The plan has [*or* plans have] been proposed in good faith and not by any means forbidden by law;

It is ordered, and notice is hereby given that:

A. The plan proposed by ..... dated ..... [*if appropriate,* and by ....., dated .....] is [are] approved.

B. ..... is fixed as the last day for filing written acceptances or rejections of such plan [*or* plans].

C. Within ..... days after the entry of this order, the trustee [*or* debtor in possession] shall transmit by mail to creditors, stockholders, and other parties in interest as provided in Rule 10–303, the plan [*or* plans] and a summary [*or* summaries] thereof approved by the court, a summary approved by the court of its opinion, if any, dated ....., approving the plan [*or* plans], and a summary of the report, if any, of the Securities and Exchange Commission, dated ..... prepared by such Commission.

D. If acceptances are filed for more than one approved plan, preferences among the plans so accepted may be indicated.

Dated: .....

.....,
Bankruptcy Judge.

[*If the court directs that a copy of the opinion, or report should be transmitted in lieu of or in addition to the summary thereof, the appropriate change should be made in paragraph C of this Order.*]

FORM NO. 10–7

BALLOT FOR ACCEPTING OR REJECTING PLAN

[*Caption, other than designation, as in Form No. 10–1*]

BALLOT FOR ACCEPTING OR REJECTING PLAN

The plan referred to in this ballot can be confirmed by the court only if two-thirds of the amount of creditors in each class and a majority of stockholders in each class voting on the plan accept the plan. Return of this ballot accepting or rejecting a plan will be deemed to be the filing of a proof of claim or stock interest only for the purpose of computing the vote. This ballot should be returned to: *Name:* .....
Address: .....
.....

[*If stockholder*] The undersigned, the holder of [*state number*] ..... shares of [*describe type*] .... stock of the above-named debtor, represented by Certificate(s) No. ....., registered in the name of.....,

[*If bondholder, debenture holder or other debt security holder*] The undersigned, the holder of [*state unpaid principal amount*] $..... of [*describe security*] ..... of the above-named debtor, due ..... [*if applicable* registered in the name of .....] [*if applicable* bearing serial number(s) .....],

[*If holder of general claim*] The undersigned, a creditor of the above-named debtor in the unpaid principal amount of $.....,

[*Check one box*]

[ ] ACCEPTS
[ ] REJECTS

the plan for the reorganization of the above-named debtor filed by ..... on ..... as approved by the court on ..... for submission for your vote.

Dated: .....

Print or type name: .....
Signed: .....
[*If appropriate*] By: .....
as: .....
Address: .....
.....

The trustee or other person transmitting this ballot to creditors or stockholders should complete the blanks indicating the person filing the plan, the date of the plan, the date of the court's order approving the plan, and the person to whom the ballot should be returned.

FORM NO. 10–8

ORDER PERMITTING FILING MODIFICATION OF PLAN, FIXING HEARING AND TIME FOR REJECTION OF MODIFICATION, COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 10–1*]

ORDER PERMITTING FILING MODIFICATION OF PLAN, FIXING HEARING AND TIME FOR REJECTION OF MODIFICATION, COMBINED WITH NOTICE THEREOF

To the debtor, its creditors and stockholders, and other parties in interest:

A modification of the plan dated ..... having been filed by ..... on ....., it is ordered and notice is hereby given that:

1. The modification, a copy [*or* a summary] of which is attached hereto, may be filed.

2. The hearing for the consideration of the proposed modification shall be held at ..... on ..... at ..... o'clock .... m., which hearing may be continued or adjourned from time to time by order made in open court, without further notice to creditors and stockholders.

3. ..... is fixed as the last day for filing a written rejection of the modification. Any creditor or stockholder who has accepted the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: .....

.....,
Bankruptcy Judge.

FORM No. 10–9

ORDER CONFIRMING PLAN

[*Caption, other than designation, as in Form No. 10–1*]

ORDER CONFIRMING PLAN

The plan under Chapter X of the Bankruptcy Act filed by ..... on ..... [*if appropriate,* as modified by a modification filed on ....,] and a summary thereof having been transmitted to creditors and stockholders; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors and stockholders whose acceptance is required by law; and

2. That acceptance of the plan has been procured in good faith and not by any means forbidden by law; that the provisions of Chapter X of the Act have been complied with; that the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by the Act; and, that the plan is fair and equitable, and feasible; and

3. All payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the case or in connection with the plan and incident to the reorganization, have been fully disclosed to the court and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the court; and

4. The identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy:

It is ordered that:

The plan filed by ..... on ..... and approved by an order of the court entered on ....., a copy of which plan is attached hereto, is confirmed.

Dated: .....

....., *Bankruptcy Judge.*

RULES OF BANKRUPTCY PROCEDURE

TITLE VI

CHAPTER XII RULES

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TITLE VI
CHAPTER XII RULES

Rule 12–1. Scope of Chapter XII rules and forms; short title.

The rules and forms in this Title VI govern the procedure in courts of bankruptcy in cases under Chapter XII of the Bankruptcy Act. These rules may be known and cited as the Chapter XII Rules. These forms may be known and cited as the Official Chapter XII Forms.

Rule 12–2. Meanings of words in the Bankruptcy Rules when applicable in a Chapter XII case.

The following words and phrases used in the Bankruptcy Rules made applicable in Chapter XII cases by these rules have the meanings herein indicated, unless they are inconsistent with the context:

(1) "Bankrupt" means "debtor."

(2) "Bankruptcy" or "bankruptcy case" means "Chapter XII case."

(3) "Receiver," "trustee," "receiver in bankruptcy," or "trustee in bankruptcy" means the "trustee" or "debtor continued in possession" in the Chapter XII case.

Rule 12–3. Commencement of Chapter XII case.

(*a*) *Method of commencement.*—A Chapter XII case is commenced by the filing of a petition with the court by a person seeking relief under Chapter XII of the Act.

(*b*) *When case may be commenced.*—The petition under Chapter XII may be an original petition or it may be filed in a case pending under another chapter of the Act.

Rule 12–4. Chapter XII cases originally commenced under another chapter of the Act.

When a case commenced under another chapter of the

Act proceeds under Chapter XII, the Chapter XII case shall be deemed to have been originally commenced as of the date of the filing of the first petition initiating a case under the Act.

Rule 12–5. Reference of cases; withdrawal of reference and assignment.

Bankruptcy Rule 102 applies in Chapter XII cases.

Rule 12–6. Original petition.

An original petition under Chapter XII of the Act shall conform substantially to Official Form No. 12–F1. An original and 4 copies of the petition shall be filed, unless a different number of copies is required by local rule. The clerk shall transmit one copy to the District Director of Internal Revenue for the district in which the case is filed, and one copy to the Secretary of the Treasury.

Rule 12–7. Petition in pending case.

If a case under another chapter of the Act is pending by or against the debtor, any petition under Chapter XII shall be filed therein and may be filed before or after adjudication. Such petition shall conform substantially to Official Form No. 12–F2. The number and distribution of copies shall be as specified in Rule 12–6. The filing of the petition shall act as a stay of adjudication and of administration of an estate in bankruptcy. The court may, for cause shown, terminate, annul, modify, or condition the stay.

Rule 12–8. Partnership petition.

A petition may be filed pursuant to Rule 12–6 or 12–7 by all the general partners on behalf of the partnership.

Rule 12–9. Caption of petition.

Bankruptcy Rule 106 applies in Chapter XII cases.

Rule 12–10. Filing fees.

Every petition filed pursuant to Rule 12–6 shall be accompanied by the prescribed filing fees.

Rule 12–11. Schedules, statement of affairs, and statement of executory contracts.

(*a*) *Schedules and statements required.*—The debtor shall file with the court schedules of all his debts and all his property, a statement of his affairs, and a statement of his executory contracts, prepared by him in the manner prescribed by Official Forms No. 12–F4 and either No. 12–F5 or No. 12–F6, whichever is appropriate. The number of copies of the schedules and statements shall correspond to the number of copies of the petition required by these rules.

(*b*) *Time limits.*—Except as otherwise provided herein, the schedules and statements, if not previously filed in a pending bankruptcy or Chapter XI case, shall be filed with the petition. A petition shall nevertheless be accepted by the clerk if accompanied by a list of all the debtor's creditors and their addresses, and the schedules and statements may be filed within 15 days thereafter in such case. On application, the court may grant up to 30 additional days for the filing of schedules and the statements; any further extension may be granted only for cause shown and on such notice as the court may direct.

(*c*) *Partnership.*—If the debtor is a partnership, the general partners shall prepare and file the schedules of the debts and property, statement of affairs, and statement of executory contracts of the partnership.

(*d*) *Interests acquired or arising after petition.*—Bankruptcy Rule 108 (e) applies in Chapter XII cases except that the supplemental schedule need not be filed with respect to property or interests acquired after confirmation of a plan.

Rule 12–12. Verification and amendment of petition and accompanying papers.

Bankruptcy Rules 109 and 110 apply in Chapter XII cases to petitions, schedules, statements of affairs, statements of executory contracts, and amendments thereto.

Rule 12–13. Venue and transfer.

(*a*) *Proper venue.*

(*1*) *General venue requirement.*—A petition filed pursuant to Rule 12–6 may be filed in the district (A) where the debtor has had his principal place of business or his principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or (B) if there is no such district, in any district where the debtor has property. A petition filed pursuant to Rule 12–7 shall be filed with the court in which the other petition under the Act is pending.

(*2*) *Partner with partnership or copartner.*—Notwithstanding the foregoing: (A) a petition commencing a Chapter XII case may be filed by a general partner in a district where a petition under the Act by or against a partnership is pending; (B) a petition commencing a Chapter XII case may be filed by a partnership or by any other general partner or any combination of the partnership and the general partners in a district where a petition under the Act by or against a general partner is pending.

(*3*) *Affiliate.*—Notwithstanding the foregoing, a petition commencing a Chapter XII case may be filed by an affiliate of a debtor or bankrupt in a district where a petition under the Act by or against the debtor or bankrupt is pending.

(*b*) *Transfer of cases; dismissal or retention when venue improper; reference of transferred cases.*—Bankruptcy Rule 116 (b) and (d) apply in Chapter XII cases.

(*c*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—Bankruptcy Rule 116 (c) applies in Chapter XII cases.

Rule 12–14. Joint administration of cases pending in same court.

Bankruptcy Rule 117 (b) and (c) apply in Chapter XII cases.

Rule 12–15. Death or insanity of debtor.

In the event of death or insanity of the debtor, a Chapter XII case may be dismissed, or if further administration is feasible and in the best interest of the parties, the estate may be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

Rule 12–16. Debtor involved in foreign proceeding.

Bankruptcy Rule 119 applies in Chapter XII cases.

Rule 12–17. Appointment of trustee; continuance of debtor in possession; removal.

(*a*) *Reappointment of bankruptcy trustee.*—When a petition is filed under Rule 12–7 after the qualification of a trustee in bankruptcy in a pending bankruptcy case, the court shall appoint such trustee as trustee in the Chapter XII case.

(*b*) *Retention of debtor in possession; appointment of trustee.*—On the filing of a petition under Rule 12–6 or 12–7, if no trustee in bankruptcy has previously qualified, the debtor shall continue in possession. On application of any party in interest, the court may, for cause shown, appoint a trustee.

(*c*) *Notice to trustee of his appointment; qualification.*—The court shall immediately notify the trustee of his appointment, inform him as to how he may qualify, and require him forthwith to notify the court of his acceptance or rejection of the office. A trustee shall qualify as provided in Rule 12–19.

(*d*) *Eligibility.*—Only a person who is eligible to be a trustee under Bankruptcy Rule 209 (d) may be appointed a trustee in a Chapter XII case.

(*e*) *Removal of trustee for cause.*—On application of any party in interest or on the court's own initiative and after hearing on notice, the court may remove a trustee for cause and either appoint a successor or designate the debtor as debtor in possession.

(*f*) *Substitution of successor.*—When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a Chapter XII case, his successor is automatically substituted as a party in any pending action, proceeding, or matter without abatement.

Rule 12–18. Trustees for estates when joint administration ordered.

(*a*) *Appointment of trustees for estates being jointly administered.*—If the court orders a joint administration of 2 or more estates pursuant to Rule 12–14, it may appoint one or more common trustees or separate trustees for the estates being jointly administered. Common trustees shall not be appointed unless the court is satisfied that parties in interest in the different estates will not be prejudiced by conflicts of interest of such trustees.

(*b*) *Separate accounts.*—The trustee or trustees of estates being jointly administered shall nevertheless keep separate accounts of the property of each estate.

Rule 12–19. Qualification by trustee and disbursing agent; indemnity; bonds; evidence.

(*a*) *Qualifying bond or security.*—Except as provided hereinafter, every trustee within 5 days after his appointment, and every person specially appointed as disbursing agent within the time fixed by the court shall, before entering on the performance of his official duties, qualify by filing a bond in favor of the United States conditioned on the faithful performance of his official duties or by giving such other security as may be approved by the court.

(*b*) *Blanket bond.*—The court may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by a trustee in more than one case or by more than one trustee.

(*c*) *Qualification by filing acceptance.*—A trustee for whom a blanket bond has been filed pursuant to subdivision (b) of this rule shall qualify by filing his acceptance of his appointment in lieu of the bond.

(*d*) *Indemnification.*—The court may after hearing on notice to the debtor and such other persons as the court may direct, order the debtor to indemnify or otherwise protect the estate against subsequent loss thereto or diminution thereof until the entry, if any, of an order of adjudication.

(*e*) *Amount of bond and sufficiency of surety; filing of bond; proceeding on bond.*—Bankruptcy Rule 212 (e) and (f) apply to the bonds of trustees and persons specially appointed as disbursing agents in Chapter XII cases.

(*f*) *Evidence of qualification; debtor continued in possession.*—A certified copy of the order approving the bond or other security given by a trustee under subdivision (a) or of his acceptance filed under subdivision (c) of this rule shall constitute conclusive evidence of his appointment and qualification. Whenever evidence is required that a debtor is a debtor in possession, the court may so certify and the certificate shall constitute conclusive evidence of that fact.

Rule 12–20. Limitation on appointment of trustees.

Bankruptcy Rule 213 applies in Chapter XII cases.

Rule 12–21. Employment of attorneys and accountants.

Bankruptcy Rule 215 applies in Chapter XII cases.

Rule 12–22. Authorization of trustee or debtor in possession to conduct business of debtor.

The court may authorize the trustee or debtor in possession to conduct the business and manage the property of the debtor for such time and on such conditions as may be in the best interest of the estate.

Rule 12–23. Notice to parties in interest and the United States.

(*a*) *Ten-day notices to parties in interest.*—Except as provided hereinafter, the court shall give the trustee, the debtor, all creditors, and indenture trustees at least 10 days' notice by mail of (1) a meeting of creditors;

(2) any proposed sale of property, other than in the ordinary course of business, including the time and place of any public sale, unless the court on cause shown shortens the time or orders a sale without notice; (3) the hearing on the approval of a compromise or settlement of a controversy, unless the court on cause shown directs that notice not be sent; (4) the time for filing objections to confirmation; (5) the hearing to consider confirmation of a plan; (6) the time fixed to reject a proposed modification of a plan when notice is required by Rule 12–39; and (7) the hearing on an application for allowances for compensation or reimbursement of expenses. The notice of a proposed sale of property, including real estate, is sufficient if it generally describes the property to be sold. The notice of a hearing on an application for compensation or reimbursement of expenses shall specify the applicant and the amount requested.

(*b*) *Other notices to parties in interest.*—The court shall give notice by mail to the trustee, the debtor, all creditors, and indenture trustees of (1) dismissal of the case pursuant to Rule 12–41; (2) the time allowed for filing a complaint to determine the dischargeability of a debt pursuant to § 17c (2) of the Act as provided in Rule 12–47; and (3) entry of an order confirming a plan pursuant to Rule 12–38.

(*c*) *Addresses of notices.*—Bankruptcy Rule 203 (e) applies in Chapter XII cases.

(*d*) *Notices to the United States.*—Copies of all notices required to be mailed to creditors under these rules shall be mailed to the United States in the manner provided in Bankruptcy Rule 203 (g).

(*e*) *Notice by publication.*—Bankruptcy Rule 203 (h) applies in Chapter XII cases.

(*f*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 12–9.

Rule 12–24. Meeting of creditors.

(*a*) *First meeting.*

(*1*) *Date and place.*—The first meeting of creditors shall be held not less than 20 nor more than 40 days after the filing of a petition commencing a Chapter XII case but if there is an application or motion to dismiss or to convert to bankruptcy pursuant to Rule 12–41 or an appeal from or a motion to vacate an order entered under that rule, the court may delay fixing a date for such a meeting. The meeting may be held at a regular place for holding court or at any other place within the district more convenient for the parties in interest.

(*2*) *Agenda.*—The bankruptcy judge shall preside over the transaction of all business at the first meeting of creditors, including the examination of the debtor. He shall, when necessary, determine which claims are unsecured and which are secured and to what extent, which claims have voted for acceptance of a plan, and may fix a time for filing a plan if one has not been filed.

(*b*) *Special meetings.*—The court may call a special meeting of creditors on application or on its own initiative.

Rule 12–25. Representation of creditors.

(*a*) *Representation.*—A creditor may appear in a Chapter XII case and act in his own behalf or by an attorney authorized to practice in the court, and may also perform any act not constituting the practice of law by an authorized agent, attorney in fact, proxy, or committee.

(*b*) *Data required.*—Every person or commitee representing more than one creditor, and every indenture trustee shall file a signed statement with the court setting forth (1) the names and addresses of such creditors; (2) the nature and amounts of their claims and the time of acquisition thereof unless they are alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of such person or indenture trustee, and, in the case of a com-

mittee, the name or names of the person or persons at whose instance, directly or indirectly, such employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of such person, or the organization or formation of such committee, or the appearance in the case of any indenture trustee, a showing of the amounts of claims owned by such person, the members of such committee or such indenture trustee, the times when acquired, the amounts paid therefor and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby such person, committee, or indenture trustee is empowered to act on behalf of creditors. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(c) *Failure to comply; effect.*—The court on its own initiative or on application or motion of any party in interest (1) may determine whether there has been a failure to comply with the provisions of this rule or with any other applicable law regulating the activities and personnel of any person, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit any such person, committee, or indenture trustee to be heard further or to intervene in the case; (2) may examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim acquired by any person or committee in contemplation or in the course of a case under the Act and grant appropriate relief pursuant to the Act; and (3) may hold invalid any authority or acceptance given, procured, or received by a person or committee who has not complied with subdivision (b) of this rule.

Rule 12–26. Examination.

Bankruptcy Rule 205 applies in Chapter XII cases,

except that the scope of examination referred to in subdivision (d) thereof may also relate to the liabilities and financial condition of the debtor, the operation of his business and the desirability of the continuance thereof, the source of any money or property acquired or to be acquired by the debtor for the purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

Rule 12–27. Duty of trustee or debtor in possession to keep records, make reports, and furnish information.

Bankruptcy Rule 218 applies in Chapter XII cases, except that (1) the written report of the financial condition of the estate shall be made by the trustee or debtor in possession within a month after the filing of a petition commencing a Chapter XII case and every month thereafter, and shall include a statement of the operation of the business for the preceding month and, if payments are made to employees, the amounts of deductions for withholding and social security taxes and the place where such amounts are deposited; and (2) the court may excuse the filing of a final report and account by a trustee, and a debtor in possession need not file a final report and account unless ordered to do so by the court.

Rule 12–28. Compensation for services and reimbursement of expenses.

(*a*) *Factors in allowing compensation.*—Reasonable compensation and reimbursement of necessary expenses may be allowed by the court to the trustee and his attorney, the attorney for the debtor in possession, the attorney for the debtor, and such other persons as may be authorized to assist the trustee or debtor in possession, and to creditors, committees or representatives of creditors, indenture trustees, depositaries, reorganization managers, and any other parties in interest and the attorneys or agents for any of them, for services which contribute to a plan which is confirmed or to the confirmation of a

plan, and for services rendered in opposing a plan confirmation of which has been refused, and for services in connection with the administration of the estate under Chapter XII.

(*b*) *Superseded case.*—If the Chapter XII petition was filed in a pending case, the court may allow, if not already allowed, reasonable compensation for services rendered and reimbursement of expenses to a marshal, receiver, or trustee as allowed by the Act, to the attorney for petitioning creditors, to the attorney for the bankrupt or debtor, and to any other persons and their attorneys entitled to compensation under the Act or rules in such case.

(*c*) *Application for compensation and reimbursement; disclosure of arrangements regarding compensation by attorney for debtor; attorney or accountant; restriction on sharing of compensation.*—Bankruptcy Rule 219 applies in Chapter XII cases and in addition to the matters specified in subdivision (a) thereof the application for compensation for services or reimbursement for necessary expenses shall also set forth the claims against the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by the applicant or for his account after the filing of a petition commencing a case under the Act.

(*d*) *Denial of allowances.*—No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the case in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has, without the approval of the court, purchased or sold claims against the debtor, or a beneficial interest direct or indirect in such claims, or by whom or for whose account such claims, or beneficial interest therein have been otherwise acquired or transferred.

(*e*) *Dismissal or conversion to bankruptcy.*—On the dismissal or conversion of a case to another chapter under the Act, the court may allow reasonable compensation for

services rendered and reimbursement of expenses incurred in the Chapter XII case by any persons entitled thereto under this rule.

Rule 12–29. Examination of debtor's transactions with his attorney.

Bankruptcy Rule 220 applies in Chapter XII cases.

Rule 12–30. Proof of claim.

(*a*) *Schedule of debts.*—The schedule of debts filed with the court pursuant to Rule 12–11 shall constitute prima facie evidence of the validity and amount of claims of creditors which are not scheduled as disputed, contingent, or unliquidated as to amount and, except as provided in subdivision (b)(3) of this rule, it shall not be necessary for the holder of such claim to file a proof of claim.

(*b*) *Filing proof of claim.*

(*1*) *Time for filing.*—The court shall fix a time within which proofs of claim may be filed. For cause shown, the court may extend such time. Notice of the time so fixed shall be transmitted to all creditors.

(*2*) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time fixed pursuant to subdivision (b)(1) of this rule.

(*3*) *Who must file.*—(A) Any creditor, including the United States, a state, or any subdivision thereof, whose claim is scheduled as disputed, contingent, or unliquidated as to amount, shall file a proof of claim within the time fixed pursuant to subdivision (b)(1) of this rule; any such creditor who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(B) The court may, at any time, require the filing of a proof of claim within such time as it may fix. Any person required under this paragraph to file a proof of claim who fails to do so shall not, with respect to such claim, be treated as a creditor for the purposes of voting and distribution.

(4) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of such claim. Such a proof of claim shall supersede any scheduling of that claim made pursuant to Rule 12–11.

(5) *Form and place of filing.*—A proof of claim shall consist of a statement in writing setting forth a creditor's claim and, except as provided in Rule 12–32, shall be executed by the creditor or by his authorized agent. Subdivisions (b) and (c) of Bankruptcy Rule 302 apply in Chapter XII cases except that subdivision (c) shall not apply to claims founded on bonds or debentures.

(6) *Filing by indenture trustee.*—An indenture trustee may file claims for all holders, known or unknown, of securities issued pursuant to the instrument under which he is trustee.

(c) *Transfer of claim.*—If a claim other than one founded on a bond or debenture has been assigned, a statement setting forth the terms of the assignment shall be filed with the court and a copy thereof delivered to the trustee or debtor in possession.

(d) *Duty to examine and object to claims.*—The trustee or debtor in possession shall examine scheduled debts and proofs of claim and, unless no purpose would be served thereby, object to the allowance of improper claims.

(e) *Allowance when no objection made.*—Subject to the provisions of subdivision (b)(3) of this rule and Rule 12–31, a claim filed in accordance with this rule, or Rule 12–32, or scheduled in accordance with Rule 12–11, shall be deemed allowed unless objection is made by a party in interest.

(f) *Objection to allowance.*—An objection to the allowance of a claim shall be in writing. A copy of the objection and notice of a hearing thereon shall be mailed or delivered to the claimant, the debtor and the trustee, or debtor in possession. If an objection is joined with

a demand for relief of the kind specified in Bankruptcy Rule 701, the proceeding thereby becomes an adversary proceeding.

(*g*) *Reconsideration of claims.*—Bankruptcy Rule 307 applies in Chapter XII cases.

Rule 12–31. Classification of claims; valuation of security.

(*a*) *Classification of claims.*—For the purpose of the plan and its acceptance, the court may fix, after hearing on such notice as it may direct, the division of creditors into classes according to the nature of their respective claims.

(*b*) *Valuation of security.*—For the purposes of classification under subdivision (a) of this rule, of claims which may be secured in whole or in part, the court shall, if necessary, on application of any party in interest, hold a hearing on such notice as the court may direct, to determine the value of the security interest and allow the claim as unsecured to the extent it is enforceable for any excess of the claim over such value.

Rule 12–32. Claim by codebtor.

(*a*) *Filing of claim.*—If a creditor has not filed a proof of claim pursuant to Rule 12–30 (b) a person who is or may be liable with the debtor to that creditor, or who has secured that creditor, may, during the time for filing claims prescribed by Rule 12–30 (b), execute and file a proof of claim pursuant to this rule in the name of the creditor, if known or if unknown, in his own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. The creditor may nonetheless file a proof of claim pursuant to Rule 12–30 (b) and it shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(*b*) *Filing of acceptance; substitution of creditor.*—A person who has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an accept-

ance or rejection of a plan in the name of the creditor, if known or if unknown, in his own name but if the creditor files a proof of claim within the time permitted by Rule 12–30 (b) or files a notice with the court of his intention to act in his own behalf prior to confirmation, he shall be substituted for such other person, with respect to that claim, for all purposes of the Chapter XII case.

Rule 12–33. Post-petition tax claims.

Notwithstanding Rule 12–30 (b), the court may, at any time while a case is pending, permit the filing of a proof of claim for the following:

(1) Claims for taxes owing to the United States, a state, or any subdivision thereof, at the time of the filing of the petition under Rule 12–6 or 12–7 which had not been assessed prior to the date of confirmation of the plan, but which are assessed within one year after the date of the filing of the petition.

(2) Claims for taxes owing to the United States, a state, or any subdivision thereof, after the filing of the petition under Rule 12–6 or 12–7 and which are assessed while the case is pending.

Rule 12–34. Withdrawal of claim.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If, after a creditor has filed a proof of claim, an objection is filed thereto or a complaint is filed against him in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, he may not withdraw the claim save on application or motion with notice to the trustee or debtor in possession, and on order of the court containing such terms and conditions as the court deems proper.

Rule 12–35. Distribution; undistributed consideration; unclaimed funds.

(*a*) *Distributions.*—Except as otherwise provided in the plan and except with respect to an indenture trustee

authorized by the indenture under which he is trustee to receive distributions, Bankruptcy Rule 308 applies in Chapter XII cases to cash distributions made under a plan. Except as otherwise provided in the plan or ordered by the court, consideration other than cash distributed under the plan shall be issued in the name of the creditor entitled thereto and, if a power of attorney authorizing another person to receive dividends has been executed and filed in accordance with Bankruptcy Rule 910, such consideration shall be transmitted to such other person.

(*b*) *Undistributed consideration.*—Except as provided in subdivision (c) of this rule, or as otherwise ordered by the court, the disbursing agent shall return to the debtor or to such other person as may be designated by the court any money or other deposited consideration in his possession not distributed under the plan.

(*c*) *Unclaimed funds.*—Sixty days after any distribution, the disbursing agent shall stop payment on all checks then unpaid. Bankruptcy Rule 310 shall otherwise apply in Chapter XII cases.

Rule 12–36. Filing of plan; transmission to creditors; adjourned meeting.

(*a*) *Filing of plan by debtor.*—The debtor may file a plan with his petition or thereafter, but not later than a time fixed by the court.

(*b*) *Filing of plan by creditors.*—Within such time as may be fixed by the court, a plan may be filed by a creditor holding a security interest in real property or a chattel real dealt with by such plan.

(*c*) *Number of copies.*—If required by the court, the person filing a plan shall promptly furnish a sufficient number of copies to enable the court to transmit them as provided in subdivision (d) of this rule.

(*d*) *Transmittal of plan; adjourned meetings.*—If a plan is filed prior to mailing of notice of the first meeting of creditors, a copy of the plan shall accompany the

notice. If the debtor has not filed a plan prior to the first date set for the first meeting of creditors, the court, at the first meeting or thereafter, shall fix a time for filing a plan. If the debtor has not filed a plan prior to the mailing of notice of the first meeting of creditors, the court at the first meeting, shall adjourn the meeting to a date certain. When a plan is timely filed by the debtor or a creditor, a copy thereof and notice of a subsequent adjourned meeting date shall be mailed to the persons specified in Rule 12–13 (a) at least 10 days prior to such date. The court may adjourn a first meeting of creditors from time to time to dates certain.

Rule 12–37. Acceptance or rejection of plans.

(*a*) *Persons entitled to accept or reject plan; time for acceptance or rejection.*—The court shall fix a time for the acceptance or rejection of a plan or plans and notice thereof shall accompany any plan transmitted to creditors pursuant to Rule 12–36. If his claim is deemed allowed pursuant to Rule 12–30 (e) or has been allowed by the court, a creditor may accept or reject a plan or plans within the time fixed. Acceptances may be obtained before or after the filing of the petition and may be filed with the court on behalf of the accepting creditor. For cause shown and within such time, the court may permit a creditor to change or withdraw his acceptance or rejection.

(*b*) *Form of acceptance or rejection.*—An acceptance or rejection shall be in writing, shall identify the plan or plans accepted or rejected, and shall be signed by the creditor or his authorized agent. If more than one plan is transmitted pursuant to Rule 12–36, an acceptance or rejection may be filed by each creditor for any number of such plans and if acceptances are filed for more than one plan, the creditor may indicate his preferences among the plans so accepted.

(*c*) *Acceptance or rejection by partially secured creditor.*—A creditor whose claim has been allowed in part

as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan or plans in both capacities.

(*d*) *Computing requisite majorities.*—The requisite majorities necessary for the acceptance of a plan shall be computed on the basis of the claims of creditors affected by the plan who file an acceptance or rejection of the plan within the time prescribed which in no event shall be less than the requisite majorities of the filed and allowed claims. The filing of an acceptance or rejection of a plan by a creditor shall be deemed to constitute the filing of a proof of claim for the purpose of computing the majorities required by the Act.

(*e*) *Temporary allowance.*—Notwithstanding objection to a claim, the court may temporarily allow it to such extent as to the court seems proper for the purpose of accepting a plan.

Rule 12–38. Deposit; confirmation of plan; evidence of title.

(*a*) *Deposit.*—At the first meeting of creditors, after a plan has been accepted and before confirmation, the court shall (1) designate as disbursing agent the trustee, if any, otherwise the debtor in possession or a person specially appointed, to distribute, subject to the control of the court, the consideration, if any, to be deposited; and (2) fix a time before confirmation within which there shall be deposited with the disbursing agent, or in such place and on such terms as the court may approve, the money, other consideration, or security required by the Act for confirmation.

(*b*) *Waiver.*—Any person who has waived his right to share in the distribution of the deposit or in payments under the plan shall file with the court, prior to confirmation of the plan, a statement setting forth the waiver and any agreement with respect thereto made with the debtor, his attorney, or any other person.

(c) *Objections to confirmation.*—Objections to confirmation of a plan shall be filed and served on the debtor, any other person filing a plan, and creditors' committees, if any, at any time prior to confirmation or by such earlier date as the court may fix. An objection to confirmation on the ground the debtor committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt is governed by Part VII of the Bankruptcy Rules. Any other objection is governed by Bankruptcy Rule 914.

(d) *Hearing on confirmation.*—The court shall rule on confirmation of a plan after hearing on notice as provided in Rule 12–23. The hearing may be held at any time after the conclusion of the first meeting of creditors. If no objection is timely filed under subdivision (c) of this rule, the court may find, without taking proof, that the debtor has not committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt and that the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law. If more than one plan has received the requisite number of acceptances, the court shall consider the preferences indicated by the creditors pursuant to Rule 12–37 (b) in determining which plan to confirm.

(e) *Order of confirmation.*—The order of confirmation shall conform substantially to Official Form No. 12–F18. Notice of entry of the order of confirmation and a copy of the provisions of the order dealing with the discharge of the debtor shall be mailed to the debtor and to all creditors within 30 days after entry of the order.

(f) *Evidence of title.*—A certified copy of the plan and of the order confirming the plan shall constitute conclusive evidence of the revesting of title to all property in the debtor or the vesting of title in such other person as may be provided in the plan or in the order confirming the plan.

Rule 12–39. Modification of plan before or after confirmation.

At any time prior to the acceptance of a plan by the requisite majority of creditors, a person filing a plan pursuant to Rule 12–36 may file a modification thereof. After a plan has been so accepted the person filing the plan may file a modification of the plan only with leave of the court. The debtor or such creditor may also submit with the proposed modification written acceptances thereof by creditors. If the court finds that the proposed modification does not materially and adversely affect the interest of any creditor who has not in writing accepted it, the modification shall be deemed accepted by all creditors who have previously accepted the plan. Otherwise, the court shall enter an order that the plan as modified shall be deemed to have been accepted by any creditor who accepted the plan and who fails to file with the court within such reasonable time as shall be fixed in the order a written rejection of the modification. Notice of such order, accompanied by a copy of the proposed modification, shall be given to the debtor, the trustee, creditors, indenture trustees, and such other persons as the court may designate, at least 10 days before the time fixed in such order for filing rejections of the modification. The debtor or creditor shall, if required by the court, furnish a sufficient number of copies of the proposed modification to enable the court to transmit a copy with each such notice.

Rule 12–40. Revocation of confirmation.

Any party in interest may, at any time within six months after a plan has been confirmed, make a motion pursuant to the Act to revoke the confirmation as procured by fraud. The circumstances constituting the alleged fraud shall be stated with particularity. When such motion is made, the court shall reopen the case if necessary and conduct a hearing on at least 10 days'

notice to all parties in interest. If the confirmation is revoked—

(1) The court may dispose of the case pursuant to Rule 12–41 (b); or

(2) The court may receive proposals to modify the plan. Thereafter, the procedure for modification and for confirmation of a plan as modified shall follow Rules 12–38 and 12–39, except that acceptance of the plan shall not be required by any creditor who has participated in the fraud and such creditor shall not be counted in determining the amount of the claims of creditors whose acceptance is required. If a modified plan is not confirmed, the court shall dispose of the case pursuant to Rule 12–41 (b).

Rule 12–41. Dismissal or conversion to bankruptcy prior to or after confirmation of plan.

(*a*) *Voluntary dismissal or conversion to bankruptcy.*— The debtor may file an application or motion to dismiss the case or to convert it to bankruptcy at any time prior to confirmation or, where the court has retained jurisdiction, after confirmation. On the filing of such application or motion, the court shall—

(1) if the petition was filed pursuant to Rule 12–7, enter an order directing that the bankruptcy case proceed; or

(2) if the petition was filed pursuant to Rule 12–6, enter an order adjudicating the debtor a bankrupt if he so requests, or, if he requests dismissal, enter an order after hearing on notice dismissing the case or adjudicating him a bankrupt whichever may be in the best interest of the estate.

Notwithstanding the foregoing, when a plan has been filed by a creditor pursuant to Rule 12–36, the court shall not dismiss the case or adjudicate the debtor a bankrupt unless the court, after hearing on notice to the debtor, the trustee, all creditors and indenture trustees,

determines that the creditor's plan should not be confirmed under the Act or cannot be consummated.

(*b*) *Dismissal or conversion to bankruptcy for want of prosecution, denial of confirmation, default, or termination of plan.*—The court shall enter an order, after hearing on such notice as it may direct dismissing the case, or adjudicating the debtor a bankrupt if he has not been previously so adjudged, or directing that the bankruptcy case proceed, whichever may be in the best interest of the estate—

(1) for want of prosecution; or

(2) for failure to comply with an order made under Rule 12–19 (d) for indemnification; or

(3) if no plan is confirmed; or

(4) if confirmation is revoked for fraud and a modified plan is not confirmed pursuant to Rule 12–38; or

(5) where the court has retained jurisdiction after confirmation of a plan:

(A) if a confirmed plan is not consummated; or

(B) if a plan terminates by reason of the happening of a condition specified therein.

The court may reopen the case, if necessary, for the purpose of entering an order under this subdivision. Notwithstanding the foregoing, if a confirmed creditor's plan is not consummated for reasons other than the debtor's default, the court shall not order the case converted to bankruptcy without the written consent of the debtor.

(*c*) *Notice of dismissal.*—Promptly after entry of an order of dismissal under this rule, notice thereof shall be given as provided in Rule 12–23.

(*d*) *Effect of dismissal.*—Unless the order specifies to the contrary, dismissal of a case on the ground of fraud is with prejudice, and a dismissal on any other ground is without prejudice. A certified copy of the order of dismissal under this rule shall constitute conclusive evidence of the revesting of the debtor's title to his property.

(*e*) *Consent to adjudication.*—Notwithstanding the foregoing, no adjudication shall be entered under this rule against a wage earner or farmer without his written consent.

Rule 12–42. Confirmation as discharge.

(*a*) *Statement of discharge.*—The order confirming a plan shall contain provisions substantially similar to Official Form No. 12–F18 stating the effect of confirmation on the further enforcement of claims against the debtor.

(*b*) *Registration in other districts.*—An order confirming a plan that has become final may be registered in any other district by filing in the office of the clerk of the district court of that district a certified copy of the order and when so registered shall have the same effect as an order of the court of the district where registered and may be enforced in like manner.

Rule 12–43. Petition as automatic stay of actions against debtor and lien enforcement.

(*a*) *Stay of actions and lien enforcement.*—A petition filed under Rule 12–6 or 12–7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

(*b*) *Duration of stay.*—Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, modified, or conditioned by the bankruptcy court under subdivision (d), (e), or (f) of this rule, the stay shall continue until the case is closed, dismissed, or converted to bankruptcy or the property subject to the lien is, with the approval of the court, abandoned or transferred.

(*c*) *Annulment of stay.*—At the expiration of 30 days after the first meeting of creditors, a stay provided by this rule other than a stay against lien enforcement shall be deemed annulled as against any creditor whose claim has not been listed in the schedules and who has not filed his claim by that time.

(*d*) *Relief from stay.*—On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (e) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(*e*) *Ex parte relief from stay.*—On the filing of a complaint seeking relief from a stay against any act or proceeding to enforce a lien or any proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee, receiver, or debtor in possession and to the debtor and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to that party as the court may prescribe, the adverse party may ap-

pear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(*f*) *Availability of other relief.*—Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 12–44. Duties of debtor.

Bankruptcy Rule 402 applies in Chapter XII cases and, in addition to the duties specified therein, the debtor shall attend at the hearing on confirmation of a plan and, if called as a witness, testify with respect to issues raised.

Rule 12–45. Apprehension and removal of debtor to compel attendance for examination.

Bankruptcy Rule 206 applies in Chapter XII cases to a debtor and, if the debtor is a partnership, to the general partners and any other person in control of the partnership.

Rule 12–46. Exemptions.

Bankruptcy Rule 403 (a) applies in Chapter XII cases.

Rule 12–47. Determination of dischargeability of a debt; judgment on nondischargeable debt; jury trial.

Bankruptcy Rule 409 applies in Chapter XII cases except that the court may but need not make an order fixing a time for filing a complaint under § 17c (2) of the Act. If such an order is made, at least 30 days' notice of the time so fixed shall be given to all creditors in the manner provided in Rule 12–23. The court may for cause, on its own initiative or on application of any party in interest, extend the time so fixed under this rule. If such an order is not made, a complaint to determine the dischargeability of a debt under clause (2), (4), or (8) of § 17a of the Act may be filed at any time.

Rule 12–48. Duty of trustee or debtor in possession to give notice of Chapter XII case.

Bankruptcy Rule 602 applies in Chapter XII cases.

Rule 12–49. Burden of proof as to validity of post-petition transfer.

Bankruptcy Rule 603 applies in Chapter XII cases.

Rule 12–50. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any person required by the Act to deliver property in his possession or control to the trustee or debtor in possession, shall promptly file a written report and account with the court in which the Chapter XII case is pending with respect to the property of the estate and his administration thereof.

(*b*) *Examination of administration.*—On the filing of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, the court shall determine the propriety of such administration, including the reasonableness of all disbursements.

Rule 12–51. Money of the estate: Deposit and disbursement.

Bankruptcy Rule 605 (b) and (c) apply in Chapter XII cases.

Rule 12–52. Rejection of executory contracts.

When a motion is made for the rejection of an executory contract, including an unexpired lease, other than as part of the plan, the court shall set a hearing on notice to the parties to the contract and to such other persons as the court may direct.

Rule 12–53. Appraisal and sale of property; compensation and eligibility of appraisers and auctioneers.

(*a*) *Appraiser: Appointment and duties.*—The court may appoint one or more competent and disinterested appraisers who shall prepare and file with the court an appraisal of the property of the debtor. The court may prescribe how such appraisal shall be made.

(*b*) *Sale of property.*—The court may, on such notice as it may direct and for cause shown, authorize the

trustee or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the court may approve.

(c) *Compensation and eligibility of auctioneers and appraisers.*—Bankruptcy Rule 606 (c) applies in Chapter XII cases to any appraiser or auctioneer appointed by the court.

Rule 12–54. Abandonment of property.

After hearing on such notice as the court may direct and on approval by the court, the trustee or debtor in possession may abandon any property.

Rule 12–55. Redemption of property from lien or sale.

Bankruptcy Rule 609 applies in Chapter XII cases.

Rule 12–56. Prosecution and defense of proceedings by trustee or debtor in possession.

Bankruptcy Rule 610 applies in Chapter XII cases.

Rule 12–57. Preservation of voidable transfer.

Bankruptcy Rule 611 applies in Chapter XII cases.

Rule 12–58. Proceeding to avoid indemnifying lien or transfer to surety.

Bankruptcy Rule 612 applies in Chapter XII cases.

Rule 12–59. Courts of bankruptcy; officers and personnel; their duties.

Part V of the Bankruptcy Rules applies in Chapter XII cases.

Rule 12–60. Adversary proceedings.

(a) *Adversary proceedings.*—Part VII of the Bankruptcy Rules shall govern any proceeding instituted by a party before a bankruptcy judge in a Chapter XII case to (1) recover money or property other than a proceeding under Rule 12–29 or Rule 12–50, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a

money satisfaction, (4) obtain an injunction, (5) obtain relief from a stay as provided in Rule 12–43, (6) object to confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.

(*b*) *Reference in Bankruptcy Rules.*—As applied in Chapter XII cases, the reference in Rule 741 to "a complaint objecting to the bankrupt's discharge" shall be read to include also a reference to "a complaint objecting to the confirmation of a plan on the ground that the debtor has committed any act or failed to perform any duty which would be a bar to the discharge of a bankrupt."

Rule 12–61. Appeal to district court.

Part VIII of the Bankruptcy Rules applies in Chapter XII cases, except that:

(1) Rule 802 (c) thereof shall read as follows:

"(*c*) *Extension of time for appeal.*—The referee may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before such time has expired, except that a request made after the expiration of such time may be granted upon a showing of excusable neglect if the judgment or order does not authorize the sale of any property or the issuance of any certificate of indebtedness, or is not a judgment or order under Rule 12–38 confirming a plan, or is not a judgment or order under Rule 12–41 dismissing a Chapter XII case, or converting a Chapter XII case to bankruptcy."

(2) The following shall be added to Rule 805 thereof:

"Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance

of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

Rule 12–62. General provisions.

Part IX of the Bankruptcy Rules applies in Chapter XII cases, except that:

(1) The definitions of words and phrases in § 406 of the Act govern their use in Chapter XII Rules to the extent they are not inconsistent therewith.

(2) The references to various rules in Rule 906 (c) shall also include references to Chapter XII Rules 12–23 (a) and 12–24 (a)(1).

(3) The exception in Rule 910 (c) for "the execution and filing of a proof of claim" shall be read to include also "the execution and filing of an acceptance or rejection of a plan" and the reference to Official Forms in that rule shall include a reference to Official Form No. 12–F15.

(4) The reference in Rule 913 (b) to "a dischargeable debt" shall be read as "a debt which is or will be provided for by the plan."

(5) The reference in Rule 919 (a) to Rule 203 (a) shall be read as a reference to Chapter XII Rule 12–23 (a).

(6) The reference in Rule 922 (b) to Rule 102 shall be read as a reference to Chapter XII Rule 12–5.

OFFICIAL CHAPTER XII FORMS

[NOTE: These official forms should be observed and used with such alterations as may be appropriate to suit the circumstances. See Bankruptcy Rule 909.]

FORM No. 12–F1

ORIGINAL PETITION UNDER CHAPTER XII

United States District Court
for the ..... District of .....

In re ....., *Debtor* [*include here all names used by debtor within last 6 years*]	Bankruptcy No. .....

ORIGINAL PETITION UNDER CHAPTER XII

1. Petitioner's post-office address is .....
.....

2. Petitioner has had his principal place of business [*or* has had his principal assets] within this district for the preceding 6 months [*or* for a longer portion of the preceding 6 months than in any other district].

3. No other case under the Bankruptcy Act initiated on a petition by or against petitioner is now pending.

4. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XII of the Act.

5. Petitioner is insolvent [*or* unable to pay his debts as they mature].

6. A copy of petitioner's proposed plan is attached [*or* petitioner intends to file a plan pursuant to Chapter XII of the Act].

Wherefore petitioner prays for relief in accordance with Chapter XII of the Act.

Signed: .....,
Attorney for Petitioner.

Address: .....
.....

[*Petitioner signs if not represented by attorney.*]

.....,
Petitioner.

State of.....
County of..... } ss.

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....,
Petitioner.

Subscribed and sworn to before me on .....
.....,
.....
[*Official character.*]

[*Unless the petition is accompanied by a list of all the debtor's creditors and their addresses, the petition must be accompanied by a schedule of his property, a statement of his affairs, and a statement of executory contracts, pursuant to Rule 12–11. These statements shall be submitted on official forms and verified under oath.*]

FORM No. 12–F2

CHAPTER XII PETITION IN PENDING CASE

[*Caption, other than designation, as in Form No. 12–F1*]

CHAPTER XII PETITION IN PENDING CASE

1. Petitioner's post-office address is .....
.....

2. Petitioner is the bankrupt [*or* debtor] in Bankruptcy Case No. ....., pending in this court.

3. Petitioner is qualified to file this petition and is entitled to the benefits of Chapter XII of the Bankruptcy Act.

4. Petitioner is insolvent [*or* unable to pay his debts as they mature].

5. A copy of petitioner's proposed plan is attached [*or* petitioner intends to file a plan pursuant to Chapter XII of the Act].

Wherefore petitioner prays for relief in accordance with Chapter XII of the Act.

Signed: .....,
Attorney for Petitioner.

Address: .....,
.....

[*Petitioner signs if not represented by attorney.*]

.....,
Petitioner.

State of .....
County of ..... } ss.

I, ..., the petitioner named in the foregoing petition, do hereby swear that the statements contained therein are true according to the best of my knowledge, information, and belief.

.....
Petitioner.

Subscribed and sworn to before me on .....
.....,
.....
[*Official character.*]

[*Unless the schedules and statements have already been filed in the pending case they must be filed with this petition or within 15 days thereafter as provided in Rule 12–11. These statements shall be on official forms and verified under oath.*]

FORM NO. 12–F3

VERIFICATION ON BEHALF OF A PARTNERSHIP

[*Form No. 5 of the Bankruptcy Forms is applicable and should be used.*]

FORM NO. 12–F4

SCHEDULES

[*Form No. 6 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 6 should be changed to "debtor."*]

FORM NO. 12–F5

STATEMENT OF AFFAIRS FOR DEBTOR NOT ENGAGED IN BUSINESS

[*Form No. 7 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 7 should be changed to "debtor."*]

[*The term "original petition" as used in that form means the petition filed under Rule 12–6 or, if filed in a pending case, the first petition initiating a case under the Act.*]

FORM NO. 12–F6

STATEMENT OF AFFAIRS FOR DEBTOR ENGAGED IN BUSINESS

[*Form No. 8 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 8 should be changed to "debtor."*]

[*The term "original petition" as used in that form means the petition filed under Rule 12–6 or, if filed in a pending case, the first petition initiating a case under the Act.*]

FORM NO. 12–F7

ORDER APPOINTING TRUSTEE OR DISBURSING AGENT AND FIXING THE AMOUNT OF HIS BOND

[*Caption, other than designation, as in Form No. 12–F1*]

ORDER APPOINTING TRUSTEE [OR DISBURSING AGENT] AND FIXING THE AMOUNT OF HIS BOND

1. ....., of* ....., is hereby appointed

*State post-office address.

trustee of the estate [*or* disbursing agent for the estate] of the above-named debtor.

2. The amount of the bond of the trustee [*or* disbursing agent] is fixed at $.....

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F8

NOTICE TO TRUSTEE OR DISBURSING AGENT OF HIS APPOINTMENT

[*Caption, other than designation, as in Form No. 12–F1*]

NOTICE TO TRUSTEE [OR DISBURSING AGENT] OF HIS APPOINTMENT

To ....., of* .....:

You are hereby notified of your appointment as trustee of the estate [*or* disbursing agent for the estate] of the above-named debtor. The amount of your bond has been fixed at $.....

[*The following paragraph is applicable to trustee only*]

You are required to notify the undersigned forthwith of your acceptance or rejection of the office of trustee.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F9

BOND OF TRUSTEE OF DISBURSING AGENT

[*Caption, other than designation, as in Form No. 12–F1*]

BOND OF TRUSTEE [OR DISBURSING AGENT]

We, ..., of* ....., as principal, and ....., of* ....., as surety, bind ourselves to the United States in the sum of $..... for the faithful performance by the undersigned principal of his official duties as trustee of the estate [*or* disbursing agent for the estate] of the above-named debtor.

Dated: .....

.....
Principal.

.....
Surety.

**State post-office address.*

FORM No. 12–F10

ORDER APPROVING TRUSTEE'S OR DISBURSING AGENT'S BOND

[*Caption, other than designation, as in Form No. 12–F1*]

ORDER APPROVING TRUSTEE'S [OR DISBURSING AGENT'S] BOND

The bond filed by ..... of* ..... as trustee of the estate [*or* disbursing agent for the estate] of the above-named debtor is hereby approved.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F11

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

[*Caption, other than designation, as in Form No. 12–F1*]

CERTIFICATE OF RETENTION OF DEBTOR IN POSSESSION

I hereby certify that the above-named debtor continues in possession of his estate as debtor in possession, no trustee having been appointed or qualified.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F12

ORDER FOR FIRST MEETING OF CREDITORS AND RELATED ORDERS, COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

[*Caption, other than designation, as in Form No. 12–F1*]

ORDER FOR FIRST MEETING OF CREDITORS COMBINED WITH NOTICE THEREOF AND OF AUTOMATIC STAY

To the debtor, his creditors, and other parties in interest:

....., of* ....., having filed a petition on ..... stating that he desires to effect a plan under Chapter XII of the Bankruptcy Act, it is ordered, and notice is hereby given, that:

1. The first meeting of creditors shall be held at ...., on ...., at ..... o'clock .... m.;

*State post-office address.

2. The debtor shall appear in person [*or, if the debtor is a partnership, by a general partner*] before the court at that time and place for the purpose of being examined;

3. The hearing on confirmation of a plan shall be held at a date to be later fixed [*or* at a date to be fixed at the first meeting *or* at ..... on ..... at ..... *or* immediately following the conclusion of the first meeting].

4. Creditors may file written objections to confirmation at any time prior to confirmation, [*or* ..... is fixed as the last day for the filing of objections to confirmation, *or* objections to confirmation may be filed by a date to be later fixed].

You are further notified that:

The meeting may be continued or adjourned from time to time by order made in open court, without further written notice to creditors.

At the meeting the creditors may file their claims and acceptances of the plan, examine the debtor as permitted by the court, and transact such other business as may properly come before the meeting.

The filing of the petition by the debtor above named operates as a stay of the commencement or continuation of any court proceeding to enforce any lien on the property of the debtor, and of any court proceeding commenced for the purpose of rehabilitation of the debtor or the liquidation of his estate, as provided by Rule 12–43.

The debtor has filed or will file a schedule of debts pursuant to Rule 12–11. Any scheduled creditor whose claim is not scheduled as disputed, contingent, or unliquidated as to amount, may, but need not, file a proof of claim in this case. All other creditors desiring to participate must file their proofs of claim on or before ...., which date is hereby fixed as the last day for filing a proof of claim [*or, if appropriate,* on or before a date to be later fixed of which you will be notified]. Any creditor who desires to rely on the list has the responsibility for determining that he is accurately scheduled.

A claim may be filed in the office of the undersigned bankruptcy judge on an official form prescribed for a proof of claim.

[*If appropriate*] .....
of* ..... has been appointed trustee of the estate of the above-named debtor.

Dated: .....

.....,
Bankruptcy Judge.

**State post-office address.*

FORM NO. 12–F13

PROOF OF CLAIM

[*Form No. 15 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 15 should be changed to "debtor."*]

FORM NO. 12–F14

PROOF OF CLAIM FOR WAGES, SALARY, OR COMMISSIONS

[*Form No. 16 of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16 should be changed to "debtor."*]

FORM NO. 12–F15

PROOF OF MULTIPLE CLAIMS FOR WAGES, SALARY, OR COMMISSIONS

[*Form No. 16A of the Bankruptcy Forms is applicable and should be used. The word "bankrupt" wherever used in Form No. 16A should be changed to "debtor."*]

FORM NO. 12–F16

POWER OF ATTORNEY

[*Caption, other than designation, as in Form No. 12–F1*]

POWER OF ATTORNEY

To ..... of* ....., and ..... of* .....:

The undersigned claimant hereby authorizes you, or any one of you, as attorney in fact for the undersigned and with full power of substitution, to receive distributions and in general to perform any act not constituting the practice of law for the undersigned in all matters arising in this case.

Dated: .....

Signed: .....

[*If appropriate*] By: .....

as .....

Address: .....

**State post-office address.*

[*If executed by an individual*]

Acknowledged before me on .....

[*If executed on behalf of a partnership*]

Acknowledged before me on ....., by ....., who says that he is a member of the partnership named above and is authorized to execute this power of attorney in its behalf.

[*If executed on behalf of a corporation*]

Acknowledged before me on ..... by ....., who says that he is ..... of the corporation named above and is authorized to execute this power of attorney in its behalf.

.....,

.....

[*Official character.*]

FORM NO. 12–F17

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN COMBINED WITH NOTICE THEREOF

[*Caption, other than designation, as in Form No. 12–F1*]

ORDER FIXING TIME TO REJECT MODIFICATION OF PLAN COMBINED WITH NOTICE THEREOF

To the debtor, his creditors and other parties in interest:

The debtor having filed a modification of his plan on..... ....., it is ordered, and notice is hereby given that:

1. ..... is fixed as the last day for filing a written rejection of the modification.

2. A copy [*or* a summary] of the modification is attached hereto. Any creditor who has accepted the plan and who fails to file a written rejection of the modification within the time above specified shall be deemed to have accepted the plan as modified.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F18

ORDER CONFIRMING PLAN

[*Caption, other than designation, as in Form No. 12–F1*]

ORDER CONFIRMING PLAN

The plan filed by ..... on ....., [*if appropriate,* as modified by a modification filed on .....,] having been transmitted to creditors; and

The deposit required by Chapter XII of the Bankruptcy Act having been made; and

It having been determined after hearing on notice:

1. That the plan has been accepted in writing by the creditors whose acceptance is required by law [*or* by all creditors affected thereby]; and

2. That the plan has been proposed and its acceptance procured in good faith, and not by any means, promises, or acts forbidden by law [and, *if the plan is accepted by less than all affected creditors,* the provisions of Chapter XII of the Act have been complied with, the plan is for the best interests of the creditors and is feasible, the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt];

It is ordered that:

A. The plan filed by ..... on ....., a copy of which is attached hereto, is confirmed.

B. Except as otherwise provided or permitted by the plan or this order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Act;

(b) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 12–47*] unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 12–47*] unless heretofore or

hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on ....., the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such a demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

C. All creditors whose debts are discharged by this order and all creditors having claims of a type referred to in paragraph (B)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: .....

....., *Bankruptcy Judge.*

FORM No. 12–F19

NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE

[*Caption, other than designation, as in Form No. 12–F1*]

NOTICE OF ORDER OF CONFIRMATION OF PLAN AND DISCHARGE

To the debtor, his creditors, and other parties in interest:

Notice is hereby given of the entry of an order of this court on ....., confirming the plan dated ....., and providing further that:

A. Except as otherwise provided or permitted by the plan or such order:

(1) The above-named debtor is released from all dischargeable debts;

(2) Any judgment theretofore or thereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

(a) debts dischargeable under § 17a and b of the Bankruptcy Act;

(b) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 12–47*] unless theretofore or thereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2) and (4) of § 17a of the Act;

(c) [*if the court has fixed a time for the filing of complaints under § 17c (2) of the Act pursuant to Rule 12–47*] unless theretofore or thereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clause (8) of § 17a of the Act, except those debts on which there was an action pending on ....., the date when the first petition was filed initiating a case under the Act, in which a right to jury trial existed and a party has either made a timely demand therefor or has submitted to this court a signed statement of intention to make such demand;

(d) debts determined by this court to be discharged under § 17c (3) of the Act.

B. All creditors whose debts are discharged by said order and all creditors having claims of a type referred to in paragraph (A)(2) above are enjoined from instituting or continuing any action or employing any process to collect such debts as personal liabilities of the above-named debtor.

Dated: .....

....., *Bankruptcy Judge.*

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CLEAN AIR AMENDMENTS OF 1970.

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DOUBLE JEOPARDY. See **Constitutional Law**, IV.

DUE PROCESS. See **Constitutional Law**, II; **Federal-State Relations**, 4; **Injunctions.**

ECONOMIC STABILIZATION ACT OF 1970. See also **Constitutional Law**, I, 2; VII.

Application to state employees.—Act's language contemplating general stabilization of "prices, rents, wages, salaries, dividends, and interest" and providing that controls should "call for generally comparable sacrifices by business and labor as well as other segments of the economy," and its legislative history showing that Congress had rejected an amendment exempting state employees, make it clear that Act was intended to apply to employees generally, including state employees. That Act did not expressly refer to States warrants no inference that controls could not extend to their employees. Fry v. United States, p. 542.

EFFECT ON INTERSTATE COMMERCE. See **Antitrust Acts**, 3–4.

ELECTIONS. See also **Constitutional Law**, III, 2–3; **Retroactivity.**

Reversible errors—State election laws—Necessity for clearance under Voting Rights Act.—District Court's error in holding that certain Mississippi statutes do not have to be submitted for clearance pursuant to § 5 of Voting Rights Act of 1965, and its consequent error in deciding constitutional challenges to statutes based on racial discrimination claims, require reversal; but this is without prejudice to that court's authority to entertain an appropriate proceeding to require that 1975 elections be conducted pursuant to a court-ordered reapportionment plan. Connor v. Waller, p. 656.

ELEMENTARY SCHOOLS. See **Constitutional Law**, V, 1.

EMISSION STANDARDS. See **Clean Air Amendments of 1970.**

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1870.**

ENJOINING COURT-MARTIAL PROCEEDINGS. See **Jurisdiction**, 1.

ENJOINING STATE PROSECUTIONS. See **Federal-State Relations**, 3.

ENVIRONMENTAL PROTECTION AGENCY. See **Clean Air Amendments of 1970.**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. See **Civil Rights Act of 1870.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III; **Retroactivity.**

EQUITY. See **Federal-State Relations**, 3.

ESTABLISHMENT CLAUSE. See **Constitutional Law**, V, 1.

EVIDENCE. See **Constitutional Law**, II, 4; **Federal Food, Drug, and Cosmetic Act**, 2; **Federal-State Relations**, 4; **Habeas Corpus.**

EXAMINING BOARDS. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

EXCESSIVE PROFITS ON GOVERNMENT CONTRACTS. See **Freedom of Information Act**, 8.

EXCISE TAXES. See **Constitutional Law**, II, 5; III, 4.

EXCULPATORY EVIDENCE. See **Habeas Corpus.**

EXEMPTION FROM ANTITRUST LAWS. See **Antitrust Acts**, 1, 4–6; **Federal-State Relations**, 6.

EXEMPTION 2 OF FREEDOM OF INFORMATION ACT. See **Procedure**, 2.

EXEMPTION 5 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act**, 1–2, 5–8; **Procedure**, 3.

EXEMPTION 7 OF FREEDOM OF INFORMATION ACT. See **Freedom of Information Act**, 3; **Procedure**, 3.

EXHAUSTION OF STATE REMEDIES. See **Habeas Corpus.**

FACE-TO-FACE REFUSAL TO COMPLY WITH COURT ORDER. See **Contempt.**

FACIAL OVERBREADTH. See **Standing to Raise Issue.**

FAILING BROKER-DEALERS. See **Securities Investor Protection Act of 1970.**

FAILURE TO STATE A CLAIM. See **Jurisdiction**, 1.

FAIRFAX COUNTY, VA. See **Antitrust Acts**, 1–3.

FAIR TRIALS. See **Constitutional Law,** II, 3, 6; **Federal-State Relations,** 3–4; **Habeas Corpus.**

FATHER'S SUPPORT OF CHILDREN. See **Constitutional Law,** III, 1; **Mootness,** 1; **Standing to Sue.**

FEDERAL COURT INTERVENTION IN COURT-MARTIAL PROCEEDINGS. See **Jurisdiction,** 1.

FEDERAL ENCLAVES. See **Constitutional Law,** VIII.

FEDERAL FOOD, DRUG, AND COSMETIC ACT.

1. *Violations—Duties of corporate officer under Act—Food distributors—Punishment.*—Act imposes upon persons exercising authority and supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also, and primarily, a duty to implement measures that will insure that violations will not occur; in order to make food distributors "the strictest censors of their merchandise," Act punishes "neglect where the law requires care, or inaction where it imposes a duty." United States v. Park, p. 658.

2. *Violations—Prosecution—Corporate officer's responsibility—Defense—Rebuttal evidence.*—In prosecution of national food chain and respondent, its president, for alleged violations of § 301 (k) of Act by causing interstate food shipments being held in certain warehouse to be exposed to rodent contamination, admission of testimony concerning warning in letter from Food and Drug Administration to respondent as to insanitary conditions at warehouse, was proper rebuttal evidence to respondent's defense that he had justifiably relied upon subordinates to handle sanitation matters. United States v. Park, p. 658.

3. *Violations—Prosecution—Corporate officer's responsibility—Instructions to jury—Propriety.*—In prosecution of national food chain and respondent, its president, for alleged violations of § 301 (k) of Act by causing interstate food shipments being held in certain warehouse to be exposed to rodent contamination, trial court's instructions to jury, viewed as a whole and in context, were not misleading and provided a proper guide for jury's determination. Charge adequately focused on issue of respondent's authority respecting conditions that formed basis of alleged violations, fairly advising jury that to find guilt it must find that respondent "had a responsible relation to the situation"; that "situation" was condition of warehouse; and that by virtue of his position he "had authority and responsibility" to deal therewith. United States v. Park, p. 658.

FEDERAL GASOLINE EXCISE TAXES. See **Constitutional Law,** II, 5; III, 4.

FEDERAL IMMUNITY FROM TAXATION. See **Constitutional Law**, VIII.

FEDERAL INTERFERENCE WITH STATE PROSECUTIONS. See **Federal-State Relations**, 2–4.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Contempt.**

FEDERAL-STATE RELATIONS. See also **Antitrust Acts**, 5–6; **Civil Rights Act of 1968**; **Clean Air Amendments of 1970**; **Constitutional Law**, I, 2; VIII; **Jurisdiction**, 2; **Procedure**, 1; **Removal.**

1. *Aid to Families with Dependent Children—Unemployed fathers—State regulation—Conflict with Social Security Act.*—Vermont regulation defining an "unemployed father" as one who is, *inter alia*, out of work, provided "[h]e is not receiving Unemployment Compensation during the same *week* as assistance is granted," as applied to exclude unemployed fathers who are merely eligible for unemployment compensation from receiving AFDC benefits, impermissibly conflicts with § 407 (b) (2) (C) (ii) of Social Security Act, as correctly interpreted by District Court as making actual payment of, rather than mere eligibility for, unemployment compensation disqualifying factor for AFDC benefits. As evidenced by that provision's legislative history, Congress did not intend provision's coverage to be at State's discretion once it elected to participate in AFDC program. Philbrook v. Glodgett, p. 707.

2. *Federal declaratory relief—Threatened state prosecution.*—Since decision on which District Court relied in dismissing action challenging constitutionality of Dallas loitering ordinance and seeking declaratory relief, was subsequently reversed in *Steffel* v. *Thompson*, 415 U. S. 452, wherein it was held that federal declaratory relief is not precluded when a state prosecution based upon an assertedly unconstitutional state statute has been threatened, but is not pending, even if a showing of bad-faith enforcement or other special circumstances has not been made, Court of Appeals' judgment affirming District Court is reversed and case is remanded to District Court for reconsideration in light of *Steffel* as to whether there is a genuine threat of prosecution and as to relationship between past prosecution and alleged threat of future prosecutions. Ellis v. Dyson, p. 426.

3. *Federal injunctive relief against state prosecution.*—Respondent's claim that he cannot obtain a fair hearing in New Jersey state courts on a criminal prosecution is without merit, and facts he alleges do not bring this matter within any exception to rule of

FEDERAL-STATE RELATIONS—Continued.

Younger v. *Harris*, 401 U. S. 37, so as to warrant granting of federal injunctive relief against state criminal prosecution. Kugler v. Helfant, p. 117.

4. *Federal intervention in state criminal proceedings—Suppression of evidence.*—Federal courts should refuse to intervene in state criminal proceedings to suppress use of evidence even when claimed to have been unlawfully obtained. Procedure ordered by Court of Appeals, whereby District Court was to enter a declaratory judgment, based on evidentiary hearing on respondent's charge that he was coerced to give grand jury testimony, on question whether such testimony was admissible in respondent's state criminal trial, would contravene basic policy against federal interference with state prosecutions as much as would granting of injunctive relief sought. Kugler v. Helfant, p. 117.

5. *State "lodger" regulations—Violation of Social Security Act.*—New York "lodger" regulations, which require a pro-rata reduction in shelter allowance of a family receiving Aid to Families with Dependent Children solely because a parent allows a nonlegally responsible person to reside in home, and which are based on assumption that nonpaying lodger is contributing to welfare of household, without inquiry into whether he in fact does so, violate Social Security Act and implementing regulations. Van Lare v. Hurley, p. 338.

6. *Subcontracting agreement between union and general contractor—Subjection to state antitrust laws—Conflict with federal labor policies.*—Respondent union's agreement with petitioner general building contractor, whereby petitioner agreed to subcontract all plumbing and mechanical work only to firms that had a current multiemployer collective-bargaining contract with respondent, is not subject to state antitrust laws, use of which to regulate union activities in aid of union organization would risk substantial conflict with policies central to federal labor law. Connell Co. v. Plumbers & Steamfitters, p. 616.

FEE SCHEDULES FOR LAWYERS. See **Antitrust Acts**, 1–3.

FIFTH AMENDMENT. See **Constitutional Law**, IV; **Contempt.**

"FINAL OPINIONS" DISCLOSABLE UNDER FREEDOM OF INFORMATION ACT. See **Freedom of Information Act**, 1, 3, 5–8.

FINANCIAL RELIEF TO CUSTOMERS OF FAILING BROKER-DEALERS. See **Securities Investor Protection Act of 1970.**

FINANCING PURCHASE OF HOME. See **Antitrust Acts**, 3–4.

FIRST AMENDMENT. See **Constitutional Law**, V; **Standing to Raise Issue.**

FOOD AND DRUG ADMINISTRATION. See **Federal Food, Drug, and Cosmetic Act.**

FOOD CONTAMINATION. See **Federal Food, Drug, and Cosmetic Act.**

FOREIGN CORPORATIONS. See **Constitutional Law**, I, 1.

FORT WORTH. See **Constitutional Law**, III, 3; **Retroactivity.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 3–6; III; IV; V; **Habeas Corpus; Retroactivity.**

FRANCHISE TAXES. See **Constitutional Law**, I, 1.

FRAUD IN SALE OF SECURITIES. See **Securities Act of 1933**, 2; **Securities Exchange Act of 1934**, 1, 3.

FREEDOM OF INFORMATION ACT. See also **Procedure**, 2–3.

1. *Exemption 5—Application to "final opinions."*—Exemption 5 of Act, which exempts "inter-agency or intra-agency memorandums" from disclosure to the public, can never apply to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency. NLRB v. Sears, Roebuck & Co., p. 132.

2. *Exemption 5—Attorney work-product rule.*—Exemption 5 of Act, which exempts "inter-agency or intra-agency memorandums" from disclosure to public, covers attorney work-product rule which clearly applies to memoranda prepared by an attorney in contemplation of litigation and setting forth attorney's theory of case and his litigation strategy. NLRB v. Sears, Roebuck & Co., p. 132.

3. *National Labor Relations Board—General Counsel—Advice and Appeals Memoranda—Documents incorporated by reference—Exemption 7.*—Petitioners' claim that documents incorporated by reference in Advice and Appeals Memoranda of NLRB's General Counsel regarding unfair labor practice charges, which documents were previously protected from disclosure by Act's Exemption 7 as "investigatory files compiled for law enforcement purposes," should not lose their exempt status by reason of incorporation, has merit, since a document protected by Exemption 7 does not become disclosable solely because it is referred to in a "final opinion," and

FREEDOM OF INFORMATION ACT—Continued.

accordingly case must be remanded to District Court for a determination whether such documents are protected by Exemption 7, as amended. NLRB v. Sears, Roebuck & Co., p. 132.

4. *National Labor Relations Board—General Counsel—Appeals Memorandum—"Circumstances of case."*—Petitioner NLRB and its General Counsel are not required to produce or create explanatory material in those instances in which an Appeals Memorandum regarding an unfair labor practice charge refers to "the circumstances of the case," nor are they required to identify, after the fact, those pre-existing documents that contain "circumstances of a case" to which an opinion may have referred, and which are not identified by party seeking disclosure. NLRB v. Sears, Roebuck & Co., p. 132.

5. *National Labor Relations Board—General Counsel—Exempt Advice and Appeals Memoranda—"Intra-agency memoranda."*—Those Advice and Appeals Memoranda that explain decisions by NLRB's General Counsel to file an unfair labor practice complaint and commence litigation before NLRB are not "final opinions" made in "adjudication of cases" within meaning of 5 U. S. C. § 552 (a)(2)(A) and do fall within scope of Act's Exemption 5, which exempts "inter-agency or intra-agency memorandums" from disclosure to public. NLRB v. Sears, Roebuck & Co., p. 132.

6. *National Labor Relations Board—General Counsel—Nonexempt Advice and Appeals Memoranda—Documents incorporated by reference.*—Documents incorporated by reference in nonexempt Advice and Appeals Memoranda that explain decisions by NLRB's General Counsel not to file unfair labor practice complaint, lose any exemption they might previously have held as "intra-agency" memoranda under Act's Exemption 5, and if an agency chooses *expressly* to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on ground that it is covered by some exemption other than Exemption 5. NLRB v. Sears, Roebuck & Co., p. 132.

7. *National Labor Relations Board—General Counsel—Nonexempt Advice and Appeals Memoranda—"Final opinions."*—Those Advice and Appeals Memoranda that explain decisions by NLRB's General Counsel not to file an unfair labor practice complaint are "final opinions" made in "adjudication of cases" within meaning of 5 U. S. C. § 552 (a)(2)(A), and hence fall outside scope of Act's Exemption 5, which exempts "inter-agency or intra-agency memo-

FREEDOM OF INFORMATION ACT—Continued.

randums" from disclosure to public, and must be disclosed. NLRB v. Sears, Roebuck & Co., p. 132.

8. *Renegotiation Board—Regional Board and Division Reports—Exemption 5.*—Neither Regional Board nor Division Reports to Renegotiation Board as to whether Government contractor realized excessive profits are final opinions disclosable under 5 U. S. C. § 552 (a)(2)(A), and thus such reports fall within Act's Exemption 5, which exempts "inter-agency or intra-agency memorandums" from disclosure to public, since (1) only full Board has power by law to make decision whether excessive profits exist; (2) both types of reports are prepared prior to that decision and are used by Board in its deliberations; and (3) evidence fails to support conclusion that reasoning in reports is adopted by Board as *its* reasoning, even when it agrees with report's conclusion. Renegotiation Board v. Grumman Aircraft, p. 168.

FREEDOM OF RELIGION. See **Constitutional Law**, V, 1.

FREEDOM OF SPEECH. See **Constitutional Law**, V, 2; **Standing to Raise Issue.**

GASOLINE EXCISE TAXES. See **Constitutional Law**, II, 5; III, 4.

GENERAL COUNSEL FOR NATIONAL LABOR RELATIONS BOARD. See **Freedom of Information Act**, 3–7; **Procedure**, 2–3.

GENERAL-OBLIGATION BOND ELECTIONS. See **Constitutional Law**, III, 3; **Retroactivity.**

GEORGIA. See **Clean Air Amendments of 1970.**

GOVERNMENT CONTRACTS. See **Freedom of Information Act**, 8.

GOVERNMENT PERMITS. See **Attorneys' Fees.**

GRAND JURY TESTIMONY. See **Federal-State Relations**, 4.

GROSS PROCEEDS OF RETAIL SALES. See **Constitutional Law**, II, 5; III, 4.

HABEAS CORPUS.

Bar to relief—Failure to exhaust state remedies.—Respondent state prisoner failed to exhaust available state remedies on denial-of-fair-trial claim involving destruction of exculpatory evidence that formed basis for unconditional federal writ of habeas corpus, and

HABEAS CORPUS—Continued.
hence he is entitled to no relief based upon a claim with respect to which state remedies have not been exhausted. Pitchess v. Davis, p. 482.

HEAT OF PASSION ON SUDDEN PROVOCATION. See **Constitutional Law**, II, 4.

HIGHEST STATE COURT. See **Appeals**, 2.

HOMICIDE. See **Constitutional Law**, II, 4.

HOUSING PROJECTS. See **Securities Act of 1933**; **Securities Exchange Act of 1934**, 2–3.

IMMUNITY OF SENATE SUBCOMMITTEE FROM JUDICIAL INTERFERENCE. See **Constitutional Law**, VI.

IMMUNITY OF UNITED STATES FROM TAXATION. See **Constitutional Law**, VIII.

IMPERMISSIBLE CLASSIFICATIONS. See **Constitutional Law**, III, 3; **Retroactivity.**

IMPLEMENTATION PLAN VARIANCE PROCEDURES. See **Clean Air Amendments of 1970.**

IMPLIED PRIVATE RIGHTS OF ACTION. See **Securities Investor Protection Act of 1970.**

INCIDENCE OF TAX. See **Constitutional Law**, I, 1; II, 5; VIII.

INCURABLE INJURIES. See **Seamen.**

INFLATION. See **Constitutional Law**, I, 2; VII; **Economic Stabilization Act of 1970.**

INJUNCTIONS. See also **Federal-State Relations**, 3–4; **Jurisdiction**, 1; **Procedure**, 1.

Erroneous restraining order and preliminary injunction.—In appellee physician's action for injunctive relief against enforcement of allegedly unconstitutional Wisconsin statute empowering state examining board temporarily to suspend a physician's license without formal proceedings, District Court erred when it restrained contested hearing at which board would determine whether appellee's license would be temporarily suspended and when it preliminarily enjoined enforcement of statute against appellee, since on record it is quite unlikely that appellee would ultimately prevail on merits of due process issue. Withrow v. Larkin, p. 35.

INJURED SEAMEN. See **Seamen.**

INSTRUCTIONAL MATERIALS AND EQUIPMENT LOANS TO NONPUBLIC SCHOOLS. See **Constitutional Law,** V, 1.

INSTRUCTIONS TO JURY. See **Federal Food, Drug, and Cosmetic Act,** 3.

INSTRUMENTALITIES OF UNITED STATES. See **Constitutional Law,** VIII.

INSUBSTANTIAL CONSTITUTIONAL CLAIM. See **Constitutional Law,** II, 1.

INTENTIONAL OBSTRUCTION OF COURT PROCEEDINGS. See **Contempt.**

INTER-AGENCY MEMORANDA. See **Freedom of Information Act,** 1–2, 5, 7–8.

INTERFERENCE WITH STATE PROSECUTIONS. See **Federal-State Relations,** 2–4.

INTERNAL REVENUE SERVICE. See **Bankruptcy Act.**

INTERNAL SECURITY ACT OF 1950. See **Constitutional Law,** VI.

INTERSTATE CARRIERS. See **Constitutional Law,** I, 1.

INTERSTATE COMMERCE. See **Antitrust Acts,** 2–3; **Constitutional Law,** I, 2.

INTERVENING LEGISLATION. See **Mootness,** 2.

INTOXICATING LIQUORS. See **Constitutional Law,** VIII.

INTRA-AGENCY MEMORANDA. See **Freedom of Information Act,** 1–2, 5–8.

INVESTIGATIVE FUNCTIONS. See **Constitutional Law,** II, 2.

INVESTIGATORY FILES. See **Freedom of Information Act,** 3; **Procedure,** 3.

INVESTMENT CONTRACTS. See **Securities Act of 1933,** 1; **Securities Exchange Act of 1934,** 2.

JUDICIAL QUESTIONING OF SENATE SUBCOMMITTEE'S ACTIVITIES. See **Constitutional Law,** VI.

JUDICIAL REVIEW. See also **Clean Air Amendments of 1970.**

Secretary of Labor's decision against suit to set aside union election—Scope of review.—While 28 U. S. C. § 1337 confers juris-

JUDICIAL REVIEW—Continued.
diction on District Court to entertain respondent defeated union-office candidate's suit to have Secretary's decision not to bring suit to set aside union election as a violation of Labor-Management Reporting and Disclosure Act of 1959 declared arbitrary and capricious and to order him to file suit, and Secretary's decision is not excepted from judicial review by 5 U. S. C. § 701 (a), but by virtue of 5 U. S. C. §§ 702 and 704 is reviewable under standard specified in § 706 (2) (A), Court of Appeals erred insofar as it construed § 706 (2) (A) to authorize District Court to allow respondent a trial-type inquiry into factual bases for Secretary's decision. Dunlop v. Bachowski, p. 560.

JURISDICTION. See also **Appeals; Civil Rights Act of 1968,** 1; **Federal-State Relations,** 6; **Judicial Review; Securities Act of 1933,** 2; **Securities Exchange Act of 1934,** 3.

1. *District Court—Intervention in court-martial proceedings—Defendant's access to documents.*—Relief as to appellee's claim, in his action in District Court to enjoin court-martial proceedings against him, that certain limitations imposed by military authorities on his pretrial access to classified documents in issue denied him due process and effective assistance of counsel, is squarely precluded by this Court's holding in *Schlesinger* v. *Councilman,* 420 U. S. 738, that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case within the military court system, the federal district courts must refrain from intervention." Hence "unlimited access" aspect of appellee's suit must be dismissed for failure to state a claim upon which relief can be granted. McLucas v. DeChamplain, p. 21.

2. *District Court—Suit challenging validity of state regulation under Aid to Families with Dependent Children program—Jurisdiction over Secretary of Health, Education, and Welfare.*—This Court will not inquire into question whether District Court had jurisdiction over appellant HEW Secretary in suit against him and Vermont official challenging validity of Vermont regulation under AFDC program, but will make an exception to general rule that this Court has a duty to so inquire, where question has been inadequately briefed, substantive issue has been decided in State's case, and Secretary has stated he will comply with District Court decision on statutory issue if it is affirmed. Exercise of District Court's jurisdiction over Secretary has resulted in no adjudication on merits that could not have been just as properly

JURISDICTION—Continued.
made without Secretary, and in no issuance of process against Secretary which he has properly contended to be wrongful before this Court. Philbrook v. Glodgett, p. 707.

JUROR EXPOSURE TO DEFENDANT'S PAST CRIMES OR TO NEWS OF CRIME CHARGED. See **Constitutional Law**, II, 3, 6.

JUROR HOSTILITY. See **Constitutional Law**, II, 6.

JURY INSTRUCTIONS. See **Federal Food, Drug, and Cosmetic Act**, 3.

JURY SELECTIONS. See **Constitutional Law**, II, 6.

JURY TRIALS. See **Appeals**, 2.

JUSTICIABILITY. See **Mootness**, 1; **Standing to Sue.**

JUVENILE COURTS. See **Constitutional Law**, IV.

LABOR. See **Freedom of Information Act**, 3–7; **Procedure**, 2–3.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See **Judicial Review.**

LABOR UNIONS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6; **Judicial Review.**

LANDRUM-GRIFFIN ACT. See **Judicial Review.**

LAWYERS' FEES. See **Antitrust Acts**, 1–4.

LEARNED PROFESSIONS. See **Antitrust Acts**, 4.

LEASES OF APARTMENTS. See **Securities Act of 1933**; **Securities Exchange Act of 1934**, 2–3.

LEGAL INCIDENCE OF TAX. See **Constitutional Law**, I, 1; II, 5; VIII.

LEGITIMATE LEGISLATIVE SPHERE. See **Constitutional Law**, VI.

LICENSES. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

LIMITATION OF ACTIONS. See **Civil Rights Act of 1870.**

LIMITATIONS ON RIGHT TO VOTE. See **Constitutional Law**, III, 3; **Retroactivity.**

LIQUEFIED PETROLEUM PRODUCTS. See **Constitutional Law**, I, 1.

LIQUOR DISTILLERS AND SUPPLIERS. See **Constitutional Law**, VIII.

LISTING OF PROPERTY FOR TAXATION. See **Constitutional Law**, III, 3; **Retroactivity.**

LOCAL BOND ELECTIONS. See **Constitutional Law**, III, 3; **Retroactivity.**

"LODGER" REGULATIONS. See **Federal-State Relations**, 5.

LOITERING. See **Federal-State Relations**, 2.

LOUISIANA. See **Constitutional Law**, I, 1; **Mootness**, 2.

LOW-COST HOUSING. See **Securities Act of 1933**, 1; **Securities Exchange Act of 1934**, 2.

MAINE. See **Constitutional Law**, II, 4.

MAINTENANCE AND CURE. See **Seamen.**

MANSLAUGHTER. See **Constitutional Law**, II, 4.

MARITIME COLLISIONS. See **Admiralty.**

MARKUPS ON LIQUOR. See **Constitutional Law**, VIII.

MASSACHUSETTS. See **Appeals**, 2.

MECHANICAL SUBCONTRACTORS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6.

MILITARY INSTALLATIONS. See **Constitutional Law**, VIII.

MINIMUM-FEE SCHEDULES FOR LAWYERS. See **Antitrust Acts**, 1–3.

MINORITY. See **Constitutional Law**, III, 1; **Mootness**, 1; **Standing to Sue.**

MISLEADING STATEMENTS IN CONNECTION WITH PURCHASE OR SALE OF SECURITIES. See **Securities Exchange Act of 1934**, 1, 3.

MISSISSIPPI. See **Civil Rights Act of 1968**, 1; **Constitutional Law**, II, 5; III, 4; VIII; **Elections; Removal.**

MITCHELL-LAMA ACT. See **Securities Act of 1933**; **Securities Exchange Act of 1934**, 2–3.

MOOTNESS. See also **Standing to Raise Issue**; **Standing to Sue.**

1. *Divorce—Child support—Effect of child's attaining age 21.*—Issue as to whether appellee husband, who was ordered by divorce decree to make monthly payments to appellant wife for support

MOOTNESS—Continued.

of parties' children, was entitled to discontinue payments for daughter's support after she attained age 18 pursuant to challenged Utah statute providing that period of minority for males extends to age 21 and for females to age 18, is not rendered moot by fact that appellant and daughter are now both over 21. If appellee is obligated by divorce decree to support daughter between ages 18 and 21, there is an amount past due and owing. Stanton v. Stanton, p. 7.

2. *Intervening laws.* Changes in state constitutional, statutory, and other applicable rules, raise question as to whether this case has become moot. Edwards v. Healy, p. 772.

"MOST FAVORED NATION" CLAUSES. See **Antitrust Acts**, 5–6.

MULTIEMPLOYER COLLECTIVE-BARGAINING AGREEMENTS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6.

MULTIPLE TRIALS. See **Constitutional Law**, IV.

MURDER. See **Constitutional Law**, II, 4.

NATIONAL AMBIENT AIR QUALITY STANDARDS. See **Clean Air Amendments of 1970.**

NATIONAL LABOR RELATIONS ACT. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6.

NATIONAL LABOR RELATIONS BOARD'S GENERAL COUNSEL. See **Freedom of Information Act**, 3–7; **Procedure**, 2–3.

NEW JERSEY. See **Federal-State Relations**, 3–4.

NEWSPAPER ADVERTISEMENTS FOR ABORTIONS. See **Constitutional Law**, V, 2; **Standing to Raise Issue.**

NEW YORK. See **Constitutional Law**, V, 2; **Federal-State Relations**, 5.

NEW YORK PRIVATE HOUSING FINANCE LAW. See **Securities Act of 1933**; **Securities Exchange Act of 1934**, 2–3.

NONAPPROPRIATED FUND ACTIVITIES. See **Constitutional Law**, VIII.

NONPAYING LODGERS. See **Federal-State Relations**, 5.

NONPUBLIC SCHOOLS. See **Constitutional Law**, V, 1.

NONSECTARIAN SCHOOLS. See **Constitutional Law**, V, 1.

NOTICE OF TAX LEVY. See **Bankruptcy Act.**

OBSTRUCTION OF COURT PROCEEDINGS. See **Contempt.**

OFFERINGS OF SECURITIES. See **Securities Exchange Act of 1934**, 1.

OHIO. See **Constitutional Law**, I, 2; VII; **Economic Stabilization Act of 1970.**

OUT-OF-STATE LIQUOR DISTILLERS AND SUPPLIERS. See **Constitutional Law**, VIII.

OVERBREADTH. See **Standing to Raise Issue.**

PAROCHIAL SCHOOLS. See **Constitutional Law**, V, 1.

PAY BOARD. See **Constitutional Law**, I, 2; VII; **Economic Stabilization Act of 1970.**

PENNSYLVANIA. See **Constitutional Law**, V, 1.

PERIOD OF MINORITY. See **Constitutional Law**, III, 1; **Mootness**, 1; **Standing to Sue.**

PERMANENT INJURIES. See **Seamen.**

PETROLEUM PRODUCTS. See **Constitutional Law**, I, 1.

PHYSICAL EVIDENCE. See **Habeas Corpus.**

PHYSICIANS. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

PIPELINES. See **Constitutional Law**, I, 1.

PLUMBING SUBCONTRACTORS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6.

POLLUTION. See **Clean Air Amendments of 1970.**

POSTPONEMENTS OF CLEAN AIR REQUIREMENTS. See **Clean Air Amendments of 1970.**

PRACTICE OF LAW. See **Antitrust Acts**, 1–4.

PRE-EMPTION. See **Federal-State Relations**, 6.

PREJUDGMENT. See **Constitutional Law**, II, 2.

PRETRIAL PUBLICITY. See **Constitutional Law**, II, 3, 6.

PRICE FIXING. See **Antitrust Acts**, 1–3.

PRIMARY AMBIENT AIR QUALITY STANDARDS. See **Clean Air Amendments of 1970.**

PRIVATE ATTORNEYS GENERAL. See **Attorneys' Fees.**

PRIVATE DAMAGES ACTIONS. See **Securities Exchange Act of 1934**, 1.

PRIVATE RIGHTS OF ACTION. See **Securities Investor Protection Act of 1970.**

PRIVATE SCHOOLS. See **Constitutional Law**, V, 1.

PROBABLE CAUSE. See **Constitutional Law**, II, 2.

PROCEDURAL DUE PROCESS. See **Constitutional Law**, II, 2.

PROCEDURE. See also **Federal-State Relations**, 3–4; **Injunctions**; **Standing to Raise Issue.**

1. *Suit to enjoin enforcement of state statute—Three-judge District Court—Improper declaration of unconstitutionality—Erroneous injunction.*—In appellee physician's action for injunctive relief against enforcement of allegedly unconstitutional Wisconsin's statute empowering state examining board temporarily to suspend a physician's license without formal proceedings, three-judge District Court's initial judgment should not have declared statute unconstitutional and erroneously enjoined board from applying it against all licensees. Withrow v. Larkin, p. 35.

2. *Supreme Court—Adjudication of claim not raised below.*—This Court will not reach petitioners' claim that Advice and Appeals Memoranda of National Labor Relations Board's General Counsel regarding unfair labor practice charges are exempt from disclosure under Freedom of Information Act's Exemption 2 as documents "related solely to the internal personnel rules and practices of an agency," that claim not having been raised below. NLRB v. Sears, Roebuck & Co., p. 132.

3. *Supreme Court—Adjudication of claim not raised or passed on below.*—This Court will not adjudicate petitioners' claim that Advice and Appeals Memoranda of National Labor Relations Board's General Counsel regarding unfair labor practice charges are exempt from disclosure under Freedom of Information Act's Exemption 7 as "investigatory files compiled for law enforcement purposes." That claim was not made in District Court and, although it was made in Court of Appeals, that court affirmed without opinion on basis of its prior decision in another case not involving Exemption 7, and it is therefore not clear whether that court passed on claim. Moreover, Congress passed a limiting amendment to Exemption 7 after petitioners filed their brief, and thus any decision of Exemption 7 issue in this case would have to be made under exemption as amended, which could not have been done by courts below. NLRB v. Sears, Roebuck & Co., p. 132.

PROFESSIONAL MISCONDUCT. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

PROOF BEYOND REASONABLE DOUBT. See **Constitutional Law**, II, 4.

PROPERTY DAMAGE. See **Admiralty.**

PROPERTY TAXES. See **Constitutional Law**, III, 3; **Retroactivity.**

PROPORTIONAL FAULT. See **Admiralty.**

PROSECUTION WITNESSES. See **Contempt.**

PROTECTED SPEECH. See **Constitutional Law**, V, 2; **Standing to Raise Issue.**

PROTECTION OF INVESTORS. See **Securities Investor Protection Act of 1970.**

PUBLIC ASSISTANCE. See **Federal-State Relations**, 1, 5.

PUNISHMENT FOR CONTEMPT. See **Contempt.**

PURCHASE OF HOME. See **Antitrust Acts**, 3.

PURCHASE OF SECURITIES. See **Securities Act of 1933**, 2; **Securities Exchange Act of 1934**, 1, 3.

PURE SPEECH. See **Constitutional Law**, V, 2; **Standing to Raise Issue.**

QUALIFICATION TO DO BUSINESS IN STATE. See **Constitutional Law**, I, 1.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1870; Elections; Removal.**

RATIONAL BASIS. See **Constitutional Law**, III, 1.

REAPPORTIONMENT. See **Elections.**

REASONABLE DOUBT. See **Constitutional Law**, II, 4.

REBUTTAL EVIDENCE. See **Federal Food, Drug, and Cosmetic Act**, 2.

RECEIVERS IN BANKRUPTCY. See **Bankruptcy Act.**

REFUSAL TO TESTIFY. See **Contempt.**

REGIONAL BOARD REPORTS. See **Freedom of Information Act**, 8.

REGIONAL DIRECTORS OF NATIONAL LABOR RELATIONS BOARD. See **Freedom of Information Act**, 1–7.

REMOVAL. See also **Civil Rights Act of 1968.**

1. *State prosecutions—28 U. S. C. § 1443 (1)—Title I, Civil Rights Act of 1968.*—Removal from state to federal court pursuant to 28

REMOVAL—Continued.

U. S. C. § 1443 (1) of prosecutions of petitioner Negroes for conspiring to bring about boycott of business establishments in Vicksburg, Miss., because of alleged racial discrimination in employment, was not warranted solely on petitioners' allegations that statutes underlying charges were unconstitutional, that there was no basis in fact for those charges, or that their arrest and prosecution otherwise denied them their constitutional rights. Nor does Title I of Civil Rights Act of 1968 furnish adequate basis for removal under § 1443 (1). Johnson v. Mississippi, p. 213.

2. *State prosecutions—28 U. S. C. § 1443 (1)—Title I, Civil Rights Act of 1968.*—Absence of any evidence or legislative history indicating that Congress intended to accomplish in Title I of Civil Rights Act of 1968 what it has failed or refused to do directly through amendment of 28 U. S. C. § 1443 (1) necessitates rejection of right of removal from state to federal court of prosecutions of petitioner Negroes for conspiring to bring about boycott of business establishments in Vicksburg, Miss., because of alleged racial discrimination in employment. In addition there are other avenues of relief open to petitioners for vindication of their federal rights that may have been or will be violated. Johnson v. Mississippi, p. 213.

"RENDERING" OF PROPERTY FOR TAXATION. See **Constitutional Law,** III, 3; **Retroactivity.**

RENEGOTIATION ACT OF 1951. See **Freedom of Information Act,** 8.

RESIDENCY DISTRICTS. See **Constitutional Law,** III, 2.

RESIDENTIAL REAL ESTATE TRANSACTIONS. See **Antitrust Acts,** 3.

RESTRAINING ORDERS. See **Injunctions; Procedure,** 1.

RESTRAINTS ON COMPETITION. See **Antitrust Acts,** 6; **Federal-State Relations, 6.**

RESTRICTIONS ON RIGHT TO VOTE. See **Constitutional Law.** III, 3; **Retroactivity.**

RETROACTIVITY. See also **Constitutional Law,** III, 3.

Rulings on constitutionality of voting restrictions.—District Court's ruling that Texas constitutional and statutory provisions and Fort Worth city charter provisions limiting right to vote in city bond issue elections to persons who have "rendered" or listed property for taxation, did not serve any compelling state interest and there-

RETROACTIVITY—Continued.

fore violated Equal Protection Clause of Fourteenth Amendment, should apply only to those bond authorization elections that were not final on date of that court's judgment. As to other jurisdictions that may have similar restrictive voting classifications, this Court's decision upholding District Court should apply only to elections not final as of date of this decision. Hill v. Stone, p. 289.

REVERSIBLE ERROR. See **Elections.**

"REVISIONS" OF STATE CLEAN AIR IMPLEMENTATION PLANS. See **Clean Air Amendments of 1970.**

RIGHTS OF ACTION. See **Securities Investor Protection Act of 1970.**

RIGHT TO FAIR TRIAL. See **Constitutional Law,** II, 3, 6; **Habeas Corpus.**

RIGHT TO MAINTAIN ACTION. See **Securities Exchange Act of 1934,** 1.

RIGHT TO VOTE. See **Constitutional Law,** III, 3; **Retroactivity.**

ROBBERY. See **Constitutional Law,** II, 3, 6.

RODENT CONTAMINATION. See **Federal Food, Drug, and Cosmetic Act,** 2–3.

RULE OF DIVIDED DAMAGES. See **Admiralty.**

RULE OF PROPORTIONAL FAULT. See **Admiralty.**

RULES OF CRIMINAL PROCEDURE. See **Contempt.**

SALE OF SECURITIES. See **Securities Act of 1933,** 2; **Securities Exchange Act of 1934,** 1, 3.

SALES TAXES. See **Constitutional Law,** II, 5; III, 4; VIII.

SANITATION. See **Federal Food, Drug, and Cosmetic Act.**

SCHOOLS. See **Constitutional Law,** V, 1.

SCOPE OF JUDICIAL REVIEW. See **Judicial Review.**

SEAMEN.

Maintenance and cure—Permanent injury.—A shipowner's duty to furnish an injured seaman maintenance and cure continues from date seamen leaves ship to date when a medical diagnosis is made that his injury was permanent immediately after his accident and therefore incurable. Vella v. Ford Motor Co., p. 1.

SECONDARY SCHOOLS. See **Constitutional Law,** V, 1.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Jurisdiction**, 2.

SECRETARY OF LABOR. See **Judicial Review.**

SECURITIES ACT OF 1933.

1. *Stock in cooperative housing corporation as "investment contract" within Act.*—A share of common stock in a cooperative housing corporation, which is required to acquire an apartment in project and which cannot be transferred to a nontenant, pledged, encumbered, or bequeathed (except to a surviving spouse), and does not convey voting rights based on number owned (residents of each apartment having one vote), does not constitute an "investment contract" as defined by Act and Securities Exchange Act of 1934, a term which, like term "any instrument commonly known as a security," involves investment in a common venture premised on a reasonable expectation of profits to be derived from entrepreneurial or managerial efforts of others. Here neither of kinds of profits traditionally associated with securities were offered to respondent shareholders; instead, as indicated in Information Bulletin issued in project's initial stages, which stressed "non-profit" nature of project, focus was upon acquisition of a place to live. United Housing Foundation, Inc. v. Forman, p. 837.

2. *Stock in cooperative housing corporation as "securities" within Act—Suit claiming fraud in sale—Lack of federal jurisdiction.*—Shares of common stock in a cooperative housing corporation, which are required to acquire an apartment in project and which cannot be transferred to a nontenant, pledged, encumbered, or bequeathed (except to a surviving spouse), and do not convey voting rights based on number owned (residents of each apartment having one vote), do not constitute "securities" within purview of Act or Securities Exchange Act of 1934, and since respondents' claims of violations of antifraud provisions of both Acts in connection with sale of stock to them are not cognizable in federal court, District Court properly dismissed their complaint. United Housing Foundation, Inc. v. Forman, p. 837.

SECURITIES AND EXCHANGE COMMISSION. See **Securities Exchange Act of 1934**, 1; **Securities Investor Protection Act of 1970.**

SECURITIES EXCHANGE ACT OF 1934.

1. *Damages action under Rule 10b–5—Who can maintain action—Birnbaum rule.*—A private damages action under Securities and Exchange Commission's Rule 10b–5 promulgated under Act and making it unlawful to use deceptive devices or make misleading

SECURITIES EXCHANGE ACT OF 1934—Continued.

statements "in connection with the purchase or sale of any security," is confined to actual purchasers or sellers of securities, and rule of *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461, precluding a person who is neither a purchaser nor a seller from bringing such an action, bars respondent offeree of securities from maintaining suit for damages for violation of § 10 (b) of Act and Rule 10b–5. Blue Chip Stamps v. Manor Drug Stores, p. 723.

2. *Stock in cooperative housing corporation as "investment contract" within Act.*—A share of common stock in a cooperative housing corporation, which is required to acquire an apartment in project and which cannot be transferred to a nontenant, pledged, encumbered, or bequeathed (except to a surviving spouse), and does not convey voting rights based on number owned (residents of each apartment having one vote), does not constitute an "investment contract" as defined by Act and Securities Act of 1933, a term which, like term "any instrument commonly known as a security," involves investment in a common venture premised on a reasonable expectation of profits to be derived from entrepreneurial or managerial efforts of others. Here neither of kinds of profits traditionally associated with securities were offered to respondent shareholders; instead, as indicated in Information Bulletin issued in project's initial stages, which stressed "non-profit" nature of project, focus was upon acquisition of a place to live. United Housing Foundation, Inc. v. Forman, p. 837.

3. *Stock in cooperative housing corporation as "securities" within Act—Suit claiming fraud in sale—Lack of federal jurisdiction.*—Shares of common stock in a cooperative housing corporation, which are required to acquire an apartment in project and which cannot be transferred to a nontenant, pledged, encumbered, or bequeathed (except to a surviving spouse), and do not convey voting rights based on number owned (residents of each apartment having one vote), do not constitute "securities" within purview of Act or Securities Act of 1933, and since respondents' claims of violations of antifraud provisions of both Acts in connection with sale of stock to them are not cognizable in federal court, District Court properly dismissed their complaint. United Housing Foundation, Inc. v. Forman, p. 837.

SECURITIES INVESTOR PROTECTION ACT OF 1970.

Customers of failing broker-dealers—Right of action under SIPA.—Customers of failing broker-dealers have no implied right of action under SIPA to compel Securities Investor Protection Corp. to act for their benefit, Securities and Exchange Commission's statutory

SECURITIES INVESTOR PROTECTION ACT OF 1970—Cont.
authority to compel SIPC to discharge its obligations being exclusive means by which SIPC can be forced to act. Securities Investor Protection v. Barbour, p. 412.

SELECTION OF JURIES. See **Constitutional Law**, II, 3, 6.

SENATE SUBCOMMITTEE ON INTERNAL SECURITY. See **Constitutional Law**, VI.

SEPARATION OF CHURCH AND STATE. See **Constitutional Law**, V, 1.

SERVICE STATION OPERATORS. See **Constitutional Law**, II, 5; III, 4.

SEX DISCRIMINATION. See **Constitutional Law**, III, 1.

SHELTER ALLOWANCES. See **Federal-State Relations**, 5.

SHERMAN ACT. See **Antitrust Acts.**

SHIPOWNER'S DUTY TO FURNISH MAINTENANCE AND CURE. See **Seamen.**

SOCIAL SECURITY ACT. See **Federal-State Relations**, 1, 5; **Jurisdiction**, 2.

SPEECH OR DEBATE CLAUSE. See **Constitutional Law**, VI.

STANDING TO RAISE ISSUE. See also **Constitutional Law**, V, 2.

Constitutionality of statute—Effect of intervening amendment.—Though intervening amendment of Virginia statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt processing of an abortion, as a practical matter moots for future issue of whether statute was facially overbroad, Virginia courts erred in denying appellant, who was convicted of violating statute, standing to raise that issue since "pure speech" rather than conduct was involved and no consideration was given to whether or not alleged overbreadth was substantial. Bigelow v. Virginia, p. 809.

STANDING TO SUE. See also **Mootness**, 1; **Securities Exchange Act of 1934**, 1.

Divorced wife—Child support—Constitutionality of statute establishing different ages of majority for males and females.—Appellant wife, to whom appellee husband was ordered by divorce decree to make payments for support of parties' daughter and son, does not lack standing, upon seeking support for daughter after age 18, to

STANDING TO SUE—Continued.

challenge constitutionality of Utah statute providing that period of minority for males extends to age 21 and for females to age 18, because she is not of age group affected by statute; another statute obligates her to support daughter to age 21. Stanton v. Stanton, p. 7.

STATE ACTION. See **Antitrust Acts**, 1.

STATE CLEAN AIR IMPLEMENTATION PLANS. See **Clean Air Amendments of 1970.**

STATE CORPORATION FRANCHISE TAXES. See **Constitutional Law**, I, 1.

STATE COURTS. See **Federal-State Relations**, 3–4.

STATE EMPLOYEES. See **Constitutional Law**, II, 1; VII; **Economic Stabilization Act of 1970.**

STATE GASOLINE EXCISE TAXES. See **Constitutional Law**, II, 5; III, 4.

STATE PRISONERS. See **Habeas Corpus.**

STATE PROSECUTIONS. See **Civil Rights Act of 1968**; **Federal-State Relations**, 2–4; **Removal.**

STATE SALES TAXES. See **Constitutional Law**, II, 5; III, 4; VIII.

STATE SOVEREIGNTY. See **Constitutional Law**, I, 2; VII.

STATE-SUBSIDIZED COOPERATIVE HOUSING PROJECTS. See **Securities Act of 1933**; **Securities Exchange Act of 1934**, 2–3

STATUTE OF LIMITATIONS. See **Civil Rights Act of 1870.**

STOCK OFFERINGS. See **Securities Exchange Act of 1934**, 1.

SUBCONTRACTORS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6.

SUBPOENAS DUCES TECUM. See **Constitutional Law**, VI.

SUFFRAGE RIGHTS. See **Constitutional Law**, III, 3; **Retroactivity.**

SUMMARY CONTEMPT PUNISHMENT. See **Contempt.**

SUPPORT OF CHILDREN. See **Constitutional Law**, III, 1; **Mootness**, 1; **Standing to Sue.**

SUPPRESSION OF EVIDENCE. See **Federal-State Relations**, 4.

SUPREMACY CLAUSE. See **Constitutional Law**, VII.

SUPREME COURT. See also **Appeals**, 2; **Procedure**, 2–3.

1. Proceedings in memory of Mr. Chief Justice Warren, p. v.
2. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Second Circuit, pp. 939, 1017.
3. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fourth Circuit, p. 981.
4. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 981.
5. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Tenth Circuit, p. 1018.
6. Bankruptcy Rules and Official Bankruptcy Forms, p. 1019.

SUSPENSION OF LIMITATION PERIOD. See **Civil Rights Act of 1870.**

SUSPENSION OF PHYSICIAN'S LICENSE. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

TAXES. See **Constitutional Law**, I, 1; II, 5; III, 4; VIII.

TAX LEVIES OR LIENS. See **Bankruptcy Act.**

TEMPORARY RESTRAINING ORDERS. See **Injunctions**; **Procedure**, 1.

TEXAS. See **Constitutional Law**, III, 3; **Federal-State Relations**, 2; **Retroactivity.**

TEXTBOOK LOANS TO NONPUBLIC SCHOOL CHILDREN. See **Constitutional Law**, V, 1.

THREATS OF CRIMINAL PROSECUTION. See **Federal-State Relations**, 2.

TITLE EXAMINATIONS. See **Antitrust Acts**, 3–4.

TOLLING OF LIMITATION PERIOD. See **Civil Rights Act of 1870.**

TORTS. See **Admiralty.**

TRADING STAMPS. See **Securities Exchange Act of 1934**, 1.

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TRANSFER HEARINGS IN JUVENILE COURT. See **Constitutional Law**, IV.

TRANSFERS OF ASSETS. See **Bankruptcy Act.**

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UNEMPLOYED FATHER PROGRAM. See **Federal-State Relations**, 1.

UNEMPLOYMENT COMPENSATION. See **Federal-State Relations**, 1

UNEQUAL RESIDENCY DISTRICTS. See **Constitutional Law**, III, 2.

UNFAIR LABOR PRACTICES. See **Freedom of Information Act**, 3–7; **Procedure**, 2–3.

UNIFORM CODE OF MILITARY JUSTICE. See **Appeals**, 1; **Constitutional Law**, II, 1.

UNION ELECTIONS. See **Judicial Review.**

UNIONS. See **Antitrust Acts**, 5–6; **Federal-State Relations**, 6; **Judicial Review.**

UNITED STATES. See **Bankruptcy Act**; **Constitutional Law**, VIII.

UTAH. See **Constitutional Law**, III, 1; **Mootness**; **Standing to Sue.**

VARIANCES FROM CLEAN AIR REQUIREMENTS. See **Clean Air Amendments of 1970.**

VERMONT. See **Federal-State Relations**, 1; **Jurisdiction**, 2.

VESSELS. See **Admiralty.**

VIOLENT INTERFERENCES WITH CIVIL RIGHTS. See **Civil Rights Act of 1968.**

VIRGINIA. See **Antitrust Acts**, 1–4; **Constitutional Law**, V, 2; **Standing to Raise Issue.**

VOIR DIRE. See **Constitutional Law**, II, 3, 6.

VOTING RIGHTS. See **Constitutional Law**, III, 3; **Elections**; **Retroactivity.**

VOTING RIGHTS ACT OF 1965. See **Elections.**

WAGE AND SALARY CONTROLS. See **Constitutional Law**, I, 2; VII; **Economic Stabilization Act of 1970.**

WELFARE REGULATIONS. See **Federal-State Relations**, 1, 5; **Jurisdiction**, 2.

WHOLESALE MARKUPS ON LIQUOR. See **Constitutional Law**, VIII.

WISCONSIN. See **Constitutional Law**, II, 2; **Injunctions**; **Procedure**, 1.

WITNESSES. See **Contempt.**

WORDS AND PHRASES.

1. *"Adjudication of cases."* 5 U. S. C. § 552 (a)(2)(A) (Freedom of Information Act). NLRB v. Sears, Roebuck & Co., p. 132.

2. *"Final opinions."* 5 U. S. C. § 552 (a)(2)(A) (Freedom of Information Act). NLRB v. Sears, Roebuck & Co., p. 132; Renegotiation Board v. Grumman Aircraft, p. 168.

3. *"Investment contract."* § 2 (1), Securities Act of 1933, 15 U. S. C. § 77b (1); § 3 (a)(10), Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(10). United Housing Foundation, Inc. v. Forman, p. 837.

4. *"Security."* § 2 (1), Securities Act of 1933, 15 U. S. C. § 77b (1); § 3 (a)(10), Securities Exchange Act of 1934, 15 U. S. C. § 78c (a)(10). United Housing Foundation, Inc. v. Forman, p. 837.

WORK-PRODUCT RULE. See **Freedom of Information Act**, 2.

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